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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ISAAC BLACKFORD, A. M.,
ONE OF THE JUDGES OF THE COURT.

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BY EDWIN A. DAVIS.

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J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

ISAAC BLACKFORD, Esquire.

CHARLES DEWEY, Esquire.

JEREMIAH SULLIVAN, Esquire.

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[*1]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1843, IN THE TWENTY-
EIGHTH YEAR OF THE STATE.

DOE, on the Demise of SHUTE *v.* GRIMES and Another.

MORTGAGEE'S RIGHT TO POSSESSION.—The mortgagee of real estate has a right to the immediate possession of the mortgaged premises, unless there be an agreement to the contrary expressed in the mortgage or plainly inferible from it.

APPEAL from the *Wayne* Circuit Court.

SULLIVAN, J.—This was an action of ejectment brought by a mortgagee against a mortgagor. Plea, not guilty. The mortgage-deed was dated *August* the 21st, 1841, and was made to secure the payment of \$4,100 in three years from its date. The suit was commenced before default in the payment of the mortgage-money, and the only question in the case is, whether ejectment may be maintained by a mortgagee against a mortgagor before default, where the mortgage-deed is silent as to the possession. The Circuit Court gave judgment for the defendant, and the plaintiff appealed to this Court.

Doe, on the Demise of Brown and Others, v. Mace and Others.

The law, we think, is well settled that the mortgagee, by virtue of his mortgage, becomes the legal owner of [*2] the *premises, and is consequently entitled at law to the immediate possession, unless there be an agreement between the parties, expressed in the contract, or plainly inferible from it, that the mortgagor shall remain in possession. Coote on Mort., 342, 351; 1 Powell on Mort., 158, n.; 3 Id., 1152; 4 Kent, 155. In *Birch v. Wright*, 1 T. R., 378, *Buller*, J., says: "The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will; and he is entitled to the estate as it is with all the crops growing on it." And in *Colman v. Packard*, 16 Mass., 39, the Court said that it had long been settled and well known, that a mortgagee had a right to immediate possession of the mortgaged premises; and yet, said the Court, "parties still go on making mortgages without any covenant respecting the possession, although it is intended that the mortgagor shall remain in possession until the condition is broken." Courts of equity also acknowledge the right of the mortgagee to the possession, and will not, it seems, interfere to prevent him from pursuing his legal remedy. *Cholmondeley v. Clinton*, 2 Merivale, 359; *Williams v. Medlicot*, 6 Price, 495. *Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman and *S. E. Perkins*, for the appellant.

J. Rariden, for the appellees.

DOE, on the Demise of BROWN and Others, v. MACE and Others.

MORTGAGE—WHO MAY SUSTAIN EJECTMENT.—The heirs of a mortgagee, or, in case of their non-residence, the executor or administrator of the mortgagee, may sustain ejectment for the mortgaged premises against the mortgagor, or his tenant claiming under a lease granted after the mortgage without the privity of the mortgagee.

Doe, on the Demise of Brown and Others, v. Mace and Others.

SAME—DEMAND.—And the suit, in such case, may be brought without a demand of possession.

[73] *APPEAL from the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Ejectment by the appellant against the appellees. The lessors of the plaintiff were the heirs and legal representatives of *Thomas B. Brown*, deceased, who was the mortgagee of the premises; the defendants were the mortgagor and others holding under him. Separate demises were laid in the declaration, and the defendants pleaded separately the general issue. Verdict and judgment for the defendants.

Upon the trial of the cause, the plaintiff moved the Court to instruct the jury, that if it were proved to their satisfaction that the lessors of the plaintiff were the heirs of the mortgagee, *T. B. Brown*, the plaintiff had a right to recover on a demise from them; 2, That if the heirs of said *Brown* are, and have been ever since his death, non-residents of the State, the plaintiff can recover on the demise of *Jenners* his administrator. The Court refused to give the instructions. The Court then instructed the jury that the plaintiff could not recover without proving notice to quit, or a demand of possession, before the suit was brought.

The Court erred in the instruction given, and in refusing to give the instructions asked. The legal title being in the mortgagee at the time of his death, it descended to his heirs, who hold the possession and receive the rents and profits as trustees for the administrator. The heirs upon whom the estate was cast very properly demised to the plaintiff, and as the legal title must prevail in this action, the Court ought to have given the first instruction asked. 2 Powell on Mort., 662, *et seq.*; 8 Mass. R., supplement. The second instruction asked was founded on the 50th section of the act organizing the Probate Courts, R. S., 1838, p. 193, by which an executor or administrator, if there be no heir or devisee present to take possession of the real estate of any testator or intestate, is authorized to take possession of such real estate, accounting for the rents and profits, &c. We think that instruction should have been given also. If on the trial the plaintiff

Doe, on the Demise of Brown and Others, v. Mace and Others.

had failed on the demise from the heirs, he had a right to resort to that from the administrator by virtue of the statute above cited.

The remaining question is, whether a mortgagee can dispossess the mortgagor, and those holding under him, [*4] without *a demand of possession or notice to quit?

We have decided at the present term, in the case of *Doe d. Shute v. Grimes et al.*, that the mortgagee is entitled at law to the immediate possession of the mortgaged premises, unless there be an agreement between the parties that the mortgagor shall remain in possession. Formerly, a mortgagor in possession was regarded in the light of a tenant at will to the mortgagee, *Powsely v. Blackman*, Cro. Jac., 659, upon which was predicated the opinion that a notice to quit was necessary before he could be dispossessed. That view is now exploded, and it is generally acknowledged at this day that no such relation exists between them. He is not entitled to the emblements, nor does he hold paying rent; he is in possession by the sufferance merely of the mortgagee, and is therefore not entitled to notice to quit before ejectment may be brought against him. The *English* authorities, since the days of Lord *Mansfield*, are uniform to this point. *Keech v. Hall*, Doug., 21; *Moss v. Gallimore*, Id., 279; *Birch v. Wright*, 1 T. R., 378; *Doe d. Fisher v. Giles et al.* 5 Bing., 421; *Doe d. Roby v. Maiscy*, 8 B. & C., 767. In the U. S. there is some contrariety in the decisions, but the weight of them is in accordance with the *English* authorities.

With regard to the under lessees of the mortgagor, the law is that they are liable, also, to be ejected without notice, provided they have been let into possession by the mortgagor subsequently to the mortgage, and without the privity of the mortgagee. But if the tenancies were created prior to the mortgage, the situation of the mortgagee is the same as that of the mortgagor before the mortgage was made. *Keech v. Hall*, *supra*; *Thunder d. Weaver v. Belcher*, 3 East, 449; *Doe d. Sheppard v. Allen*, 3 Taunt., 78. There was evidence which tended to show, that the under lessees held by virtue of a lease

Remy, Administrator, v. Butler.

from the mortgagor, made since the date of the mortgage. The testimony was not conclusive to the point, but the jury might have fairly inferred, from the testimony adduced, that the lessees did so hold.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners, and *R. Jones*, for the appellant.

D. Mace, for the appellees.

[*5] *REMY, Administrator, v. BUTLER.

DECEDENTS' ESTATES. An action can not be brought against an administrator on a promise of the intestate, (the administrator not having been guilty of waste, negligence, or fraud), after a complaint had been filed in the Probate Court by the administrator, for the purpose of settling the estate as insolvent.

ERROR to the *Franklin* Circuit Court.

DEWEY, J. — *Butler* sued *Remy*, administrator of *Remy*, on two promissory notes made by the intestate. The defendant pleaded in abatement, that, before the commencement of the suit, he had filed his complaint in the proper Probate Court, stating that he had discovered that the estate of the intestate was not sufficient to pay his debts, &c. The complaint, as set out in the plea, states the facts necessary to show the insolvency of the estate, and concludes with a prayer that it be settled as an insolvent estate, and for general relief. The complaint is averred to have been pending in the Probate Court when this action was commenced. The plaintiff demurred to the plea. The Court sustained the demurrer, and entered a judgment of *respondeat ouster*. The defendant failing to plead to the merits, final judgment was rendered against him.

The law is, that when an executor or administrator shall discover that the estate represented by him is insolvent, he shall file in the Probate Court, from which he received his appointment, or to the clerk's office in vacation, his complaint, stating

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the situation of the estate, real and personal, of the deceased, the appraised value thereof, the amount of debts outstanding against the estate, so far as they are known, and that the estate is insufficient to pay them; and praying for general relief. And from the date of the filing of the complaint, no action shall be brought or sustained against such executor or administrator, unless waste, negligence, or fraud in the discharge of his duties be alleged against him. R. S., 1838, pp. 185, 186.

The plea in abatement shows, that the administrator complied with the requisition of the statute in filing his complaint, and that the same was pending in the Probate Court when this action was commenced. As there is no allegation of waste, negligence, or fraud against the administrator, [*6] the plea *was sufficient to abate the suit. The demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Johnston, for the plaintiff.

J. Ryman and *P. L. Spooner*, for the defendant.

DOE, on the Demise of GARDNER, v. VANDEWATER.

ACKNOWLEDGMENT OF DEED.—A conveyance of land, certified to be acknowledged before a notary public of one county "under his hand and seal," may be admitted to record in another county in which the land lies.

PROOF OF RECORD OF CONVEYANCE.—Such conveyance, if recorded, may be proved by the record book, when the person offering the evidence is not a party to the conveyance and has not the control of it.

APPEAL from the Whitley Circuit Court.

DEWEY, J.—On the trial of an action of ejectment, the defendant produced the record of deeds for Whitley county, and offered to read therefrom, as evidence to the jury, the copy of a deed from the lessor of the plaintiff, conveying to a third per

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son the land in controversy, which was situate in that county. The copy purported to be the copy of a deed, acknowledged before a notary public of *Allen* county, "under his hand and seal." The evidence was objected to, but admitted by the Court. Verdict and judgment for the defendant.

It is urged against the legality of the testimony, that the deed was not properly admitted to record in *Whitley* county, for the following reasons: 1, Because the notary did not certify that the seal affixed to the authentication of the acknowledgment of the deed was his "notarial seal;" and, 2, Because his official character was not attested by the clerk of the Circuit Court of *Allen* county, under the seal of that Court.

These objections are without foundation. A notary public has the same power to take acknowledgment of deeds, which a justice of the peace possesses; "and his certificate and attestation, with his official seal, shall be taken in all cases to be of equal verity and validity with the certificate, [*7] *attestation, and seal of the clerk of a Circuit Court."

R. S., 1838, pp. 420, 421. The seal, which the notary attached to his authentication of the acknowledgment of the deed, and which he certified to be his seal, must be presumed to be his official or notarial seal; and his certificate and seal needed no support from the attestation and seal of the clerk of the Circuit Court, as they are placed by the statute on the same footing with these. The deed was properly admitted to record in *Whitley* county; and as the defendant was no party to, and can not be presumed to have had the control of it, the record was admissible evidence without farther proof of the execution of the deed. *Bowser v. Warren*, 4 Blackf., 522.

Per Curiam.—The judgment is affirmed at the costs of the *versor*.

H. Cooper, for the appellant.

W. H. Coombs, for the appellee.

Justus v. Cooper.

SPINNING v. ROWLAND, in Error.

IT was necessary, under the statute of 1838, that a petition to the Probate Court for the appointment of commissioners to assign dower, &c., should aver that, previously to its being filed, a demand on the defendant for an assignment of the dower had been made, or show a good reason why such demand had not been made. R. S., 1838, p. 239. See *Dunn v. Loder*, 5 Blackf., 446.

JUSTUS v. COOPER.

ERASURE OF PAYEE'S NAME ON NOTE.—Although the payee's name in a promissory note have been partially erased so as to be illegible, still a suit on the note may be sustained against the maker by proof that it was executed by him, that it was made payable and was delivered to the plaintiff, that the latter had possession of the note when he commenced the suit, and that his name in it had been erased under circumstances showing the validity of the note not to be affected by the erasure.

SAME—EVIDENCE.—On the trial of a suit on such note proved to have been executed by the defendant, the plaintiff offered to prove that the note was originally made "payable to him, and that he was in possession of it when he commenced the suit. *Held*, that those facts might be proved as links in the chain of the plaintiff's evidence.

ERROR to the *Parke* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit commenced by the plaintiff in error before a justice of the peace. A joint and several promissory note signed by Wm. Justus, Thomas Cooper, and Amos Wood, for \$63.00, was filed as the cause of action. The payee's name in the note was partially erased, apparently with a knife, so as to be illegible. The note, as a cause of action, was accompanied by an allegation of the plaintiff, that it was made payable to him by the name of A. Justus. A plea in denial of the defendant's execution of the note, sworn to by him, was filed. Verdict and judgment

The State, on the Relation of *Johnson, v. Stewart* and Others.

for the defendant. The plaintiff appealed to the Circuit Court. Verdict in that Court for the defendant; motion for a new trial overruled; and judgment on the verdict.

On the trial in the Circuit Court, the plaintiff proved the defendant's execution of the note; the plaintiff then offered to prove that the note was originally made payable to him by the name of *A. Justus*; and that he was in possession of the note when he commenced this suit. The Court refused to admit the evidence offered.

The plaintiff could recover on this note by proving that the defendant had executed it; that it was made payable and delivered to him by the name of *A. Justus*; that he had possession of the note when he commenced the suit on it; and that his name in it had been erased under circumstances showing the validity of the note not to be affected by the erasure.

The facts offered to be proved, though not of themselves sufficient to show the plaintiff's right to recover, were links in the chain of his evidence; and he ought, therefore, to have been permitted to prove them.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. A. Howard, for the plaintiff.

C. Fletcher, O. Butler, and *S. F. Maxwell*, for the defendant.

[*9] *THE STATE, on the Relation of *JOHNSON v. STEWART* and Others.

OFFICIAL BOND—PRACTICE.—Debt by the State, on the relation of *A*, on the official bond of the clerk of a certain Circuit Court. The breach assigned in the declaration was, that *B* had recovered judgment in that Court for a certain sum of money against *C*; that the judgment had been assigned to the relator, in the order book of the Court, by *B*, under his hand and seal; that the money had been paid to the clerk, who had refused to pay it over, &c. *Held*, that *profer* of the assignment of the judgment was unnecessary.

ERROR to the *Carroll* Circuit Court.

The State, on the Relation of Johnson, v. Stewart and Others.

SULLIVAN, J.—Debt against *Stewart* and others on the official bond of *Stewart* as clerk of the *Carroll* Circuit Court. Three breaches are assigned in the declaration. The first is, that *Stewart* did not pay over all moneys which came into his hands as such clerk and by virtue of his office, in this, to wit, that on the 28th of *April*, 1837, by the judgment of the *Carroll* Circuit Court, one *Simeon L. Stewart* recovered a judgment against *Samuel Grimes* for the sum of \$2,259.93 and costs, which judgment was afterwards assigned, on the order book of said Court, by said *S. L. Stewart* under his hand and seal to *Lewis Johnson*, the relator in this cause, of which the defendant had notice; that afterwards, to wit, on the 13th of *July*, 1840, the sum of \$2,400, the balance then due on said judgment, was paid to said *Stewart*, clerk, &c., and was received by him by virtue of his said office, which, although thereto requested by said *Johnson*, on, &c., at his said office, &c., he the said *Stewart* wholly failed and neglected to pay over. The second and third breaches are substantially the same as the first.

The defendants filed a special demurrer to the declaration, and assigned for cause of demurrer, that no *profert* was made of the supposed assignment of the said judgment by *Stewart* to *Johnson*, the relator. Joinder in demurrer; and judgment for defendants.

We perceive no valid objection to the declaration in this case. The plaintiff was not bound to make *profert* of the assignment of the judgment. Even if it were such an instrument as the party would be required, in ordinary cases, to show to the Court if he had declared upon it, yet in [*10] this case *he is excused from doing it. It is apparent that the assignment was not in the possession of the relator, which was a legal excuse for not making *profert* of it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt and *W. Wright*, for the plaintiff.

J. Pettit, for the defendants.

Ephraims and Another v. Murdock.

EPHRAIMS and Another v. MURDOCK.

RECEIPT.—A count on an instrument of writing by which the defendant acknowledged he had received, by the hand of *J. S.*, \$200 in favour of the plaintiffs, is insufficient.(a)

DECEASED WITNESS.—It is necessary to the admission of evidence of what a deceased witness swore to on a former trial, that it be proved by the record of that trial that the suit was between the same parties and for the same cause of action.

SAME.—And the precise words of the deceased witness, and not merely the substance of them, must be proved.(b)

ERROR to the Warren Circuit Court.

SULLIVAN, J.—Debt by the plaintiffs against the defendant. The declaration contains three counts. The first and second are upon an instrument of writing, by which the defendant acknowledged that he had received, by the hand of *John Stewart*, \$200 in favour of the plaintiffs, &c. The third is for money had and received. Special demurrers to the first and second counts, and *nil debet* pleaded to the third. The Court sustained the demurrers. Verdict and judgment for the defendant.

The demurrers to the first and second counts were correctly sustained. They do not show, in sufficient terms, a contract express or implied by which the defendant agreed to pay the money sued for.

On the trial of the cause, a witness was introduced by the defendant, by whom he, the defendant, offered to prove the substance of what *Thomas J. Evans*, a deceased witness, had sworn to on a former trial of the same cause between the same parties. The plaintiffs objected to the testimony, but the Court overruled the objection and admitted the witness,
 *11] *to which the plaintiffs excepted. The bill of exceptions states, “that the Court permitted the defendant to prove the substance of the testimony given by said *Thomas J. Evans* on the trial of the cause aforesaid, in which said

(a) *Harmon v. James*, 7 Ind., 263; 8 Blackf., 146.

(b) *Ward v. The State*, 8 Blackf., 101.

 Williamson v. Doe, on the Demise of Crawford.

Evans was examined as a witness, but the record of the cause in which the said *Evans* was so examined as a witness was not introduced nor offered in evidence, &c." The Court erred in overruling the plaintiffs' objection. There should have been evidence that a former trial was had between the same parties and for the same cause of action. To prove that fact the record was the best evidence, and should have been introduced *Pitton v. Walter*, 1 Strange, 162; *Doe d. Lloyd v. Passingham*, 2 Carr. & Payne, 440.

We think the Court also erred in permitting the *substance* of what the deceased witness swore on the former trial to be proved to the jury. We are aware that on this point there are conflicting decisions, but the weight of authority is in accordance with the opinion above expressed. *Rex v. Jolliffe*, 4 T. R., 285; *Ennis v. Donisthorpe*, cited in 1 Phill. Ev., 231; *Tod v. Earl of Winchelsea et al.*, 3 Carr. & Payne, 387; *Roscoe on Ev.*, 58; *Mayor of Doncaster v. Day*, 3 Taunt., 262; *Melvin v. Whiting*, 7 Pick., 79; *Commonwealth v. Richards*, 18 Id., 434. The reason given by Lord Kenyon in *Ennis v. Donisthorpe*, *supra*, that a witness "ought to recollect the very words, for the jury alone can judge of the effect of words," is of sufficient force to incline us to adhere to the ancient doctrine. Inconvenience, it is true, may result from requiring the precise words to be proved, but not so much as would probably follow if the rule were relaxed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler, for the plaintiffs.

R. C. Gregory, and *D. Brier*, for the defendant.

[*12] *WILLIAMSON v. DOE, on the Demise of CRAWFORD.

SALE OF SCHOOL LANDS.—A school commissioner's sale of land mortgaged to secure a loan of school funds, in consequence of the non-payment of interest, is void, unless he strictly pursue the authority given him by law

Williamson v. Doe, on the Demise of Crawford.

SAME.—The school commissioner's deed in case of the sale of such land, not stating that he had taken the steps pointed out by the statute (specifying them), is no evidence that he had taken those steps.

SAME.—An entry made by such commissioner on the record of deeds, stating a satisfaction of the mortgage by a sale of the mortgaged premises, a notice given by him previously to the sale, &c., is no evidence of the facts therein stated.

SAME.—The commissioner can not sell such lands until the lapse of six months after the interest have become due.

SAME.—It is the commissioner's deed alone that vests a title in the purchaser of such lands.

EVIDENCE.—The commissioner's book of accounts with the Congressional townships, containing charges against himself for interest received, is not, in ejectment by the purchaser of mortgaged premises, admissible to show the payment of the interest, unless the commissioner's testimony can not be procured.

EJECTMENT.—To sustain an ejectment, it must appear that the defendant was in possession of the premises when the action was commenced.

ERROR to the *Montgomery* Circuit Court.

DEWEY, J.—This was an action of ejectment on the demise of *Crawford* against *B. H. Williamson*, for a half quarter of a section of land. Verdict and judgment for the plaintiff. Motion for a new trial overruled.

The lessor of the plaintiff gave in evidence the following documents, viz., A mortgage of the premises in dispute, bearing date Nov. 22, 1839, executed by *B. A. Williamson* to one *Carle*, school commissioner of *Montgomery* county, to secure the payment of a loan of \$100 in three years, with interest thereon at the rate of ten *per cent. per annum*, payable in advance annually; a deed executed by *Carle*, as school commissioner, to *Crawford*, the lessor of the plaintiff, dated July 26, 1841. This deed commences, "Whereas *John Crawford* has paid the sum of one hundred and fourteen dollars and thirty-seven cents in full for the east half," &c., (the land in dispute), and proceeds, "Now know ye, that in consideration of the premises, and in conformity with the statute in such case made and provided, I, *Daniel Carle*, school commissioner, &c., for, and in the name of, the inhabitants of Congressional township, &c., do give and grant the

*13] said east half, &c., to the said *John Crawford*, his

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heirs and assigns forever;" and an entry on the record of deeds for *Montgomery* county, signed by *Carle* as school commissioner, dated *July 26, 1841*, in the following language, "I do hereby acknowledge full satisfaction on the within annexed deed of mortgage, (that before stated), by sale of the mortgaged premises at public auction, after advertising the same according to law, and after forfeiture of the same for non-payment of the interest for six months after the same fell due, at which sale *John Crawford* was the highest and best bidder, and was the purchaser; and I have executed a deed to him for the same." The official character of *Carle* was also proved. This was all the evidence on the part of the plaintiff. The defendant claimed the disputed premises under a deed from the mortgagor, executed after the date of the mortgage.

The defendant moved the Court to instruct the jury substantially as follows: That unless they believed from the testimony, the land in question was duly advertised and sold according to law, they must find for the defendant; and that the mortgage to the school commissioner, the commissioner's deed to *Crawford*, and the entry made by the commissioner on the record of deeds, did not, nor did any of them, prove that the commissioner took all the steps necessary to enable him to convey a valid title to the land. The Court refused to give the instruction, or any part of it.

The solution of the question arising from this rejected charge to the jury, depends upon the nature of the powers conferred upon school commissioners by the laws of this State, and how far those laws make the deeds which they are authorized to execute, evidence of the regularity of their proceedings in the execution of their powers.

The act incorporating congressional townships, and providing for public schools therein, authorizes the commissioner to loan the school funds on mortgage security, retaining out of the money loaned one year's interest in advance; R. S., 1838, p. 522; and the form prescribed for the mortgage shows that each year's interest is to be paid in advance until the principal be paid. *Id.*, 536. It is also provided, that if default be

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made in the payment of the interest for the space of six months after the same shall become due, no further credit [*14] *shall be given, but the whole debt, principal as well as interest, shall be immediately payable; and the commissioner shall forthwith proceed to sell the mortgaged premises, having first given twenty days' notice of the time and place of sale, by posting up written advertisements thereof in three of the most public places in the township in which the land is situate, and also by publication for three weeks successively in the newspaper printed nearest to the land, if any be printed in the county; the sale to be at the court house door; upon the payment of the purchase-money, the commissioner, or his successor, is to make a deed to the purchaser, which shall vest in him the title of the mortgagor. Id., pp. 524, 525. By a statute passed in 1835, and reprinted in the revision of 1838, school commissioners' deeds are made *prima facie* evidence of all the facts which they state. R. S., 1838, p. 548.

It is evident that the powers of the commissioner above specified are limited, special, naked powers not coupled with an interest. The law respecting such powers is, that they must be strictly pursued to render valid the act of the agent possessing them. The facts on which the right to exercise his powers depends must exist, or his transactions will be without authority and void. *Williams et al. v. Peyton's lessee*, 4 Wheat., 77. This Court has frequently recognized this principle in adjudications respecting the powers given by the revenue laws; and also in *Chill v. Hornish et al.*, 4 Blackf., 454, where we decided that the agent of State for *Indianapolis* exercised special powers only in the disposition of the public land under his control, and that to make his acts valid he must conform strictly to the requisitions of the statutes prescribing his duties. This principle, we think, is applicable to this cause; and that, therefore, the school commissioner was not authorized to sell the mortgaged premises, unless there had been a failure to pay the interest due on the mortgage for six months after it became payable, nor unless he had advertised the time and place of sale in the manner pointed out by the statute, nor at any other place than

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the court house door; and that if any of these prerequisites was wanting, a sale made by him on a forfeited mortgage is void. It is true, that the mortgage given in evidence, which is substantially in the form prescribed by the statute, contains a *clause conferring upon the commissioner the power to sell the premises, provided default should be made in the payment of the principal or interest. This power, however, which is granted in general terms, must be understood as corresponding with that given by the statute under which the mortgage was executed, and as requiring the same prerequisites which are prescribed by the law. If we do not give this construction to the mortgage, it would follow that the commissioner might sell the mortgaged premises before the lapse of six months after the interest became due, without giving previous notice, and wherever he pleased. The express enactments of the statute would thus be rendered nugatory.

It remains to be inquired whether the commissioner's deed to the purchaser of the mortgaged premises, or the entry of satisfaction of the mortgage on the record of deeds, and the other matters contained in that entry, were any evidence that the commissioner took the previous steps necessary to the validity of his sale? The mortgage was evidence that interest was due, and of the time when it became payable, but with regard to notice and to the place of sale it most evidently can have no bearing.

The recitals contained in a deed are ordinarily evidence of the facts recited against the maker of the deed; and we do not doubt the power of the Legislature to make such recitals evidence also as to strangers. But the law above referred to, providing that school commissioners' deeds shall be evidence of the facts which they state, must be placed out of view on the present occasion. The deed from the commissioner to the lessor of the plaintiff, given in evidence in this cause, is in the form prescribed by the statute for deeds for the conveyance of land belonging to the congressional township when sold by the commissioner. That form has no reference to sales of mort-

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gaged land for the forfeiture of the mortgage, nor is any form given for these cases. We do not, however, feel disposed to pronounce this deed a nullity. Though ill adapted to the occasion on which it was used, it contains words of conveyance, and is sufficient to transfer the property in question, provided the commissioner complied strictly with his authority in

all other respects. Were this a case of the sale of
[*16] land belonging to a congressional *township, as the

Legislature has prescribed the form of a deed for such an occasion, with which form this deed complies, and has enacted that the deed shall be evidence of all the facts stated in it, we might perhaps feel disposed to view the general expression in the deed, "in conformity with the statutes in such case made and provided," as sufficient proof that the commissioner had complied with all the requirements of the law. We are not, however, called upon to make a decision on this point, and we make none. But we have no hesitation in coming to the conclusion, that that expression is evidence of no fact whatever in reference to any of the previous steps necessary to be taken to render a sale of mortgaged premises valid. In truth, it asserts no fact. This deed, then, stands without the aid of any legislative enactment as to its efficacy in any other point of view than as a conveyance.

In the case of *Williams et al. v. Peyton's lessee*, before referred to, the Supreme Court of the *United States* held this language: "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." And that Court decided that the deed of a collector, who had sold land for the non-payment

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of taxes, was not *prima facie* evidence that he had himself advertised the sale in the manner prescribed by the act of Congress under which he acted. If the deed under consideration had stated the steps taken by the commissioner previous to the sale, and the place where the sale was made, and they had corresponded with the requirements of our statute, this cause would be governed by different principles, for then the deed would, by express enactment, be evidence of the truth of the statements contained in it. As it is, we are not able to distinguish it in principle from the decision above quoted. The commissioner's deed *was no evidence that he had advertised and sold the land according to law.

With regard to the entry of satisfaction of the mortgage which the commissioner made upon the record of deeds, and of the other matters therein stated, it should not have been admitted in evidence at all, or being admitted, it was entitled to no weight with the jury. The law under which the commissioner acted did not authorize such an entry. There is a general statute with regard to all mortgages which requires that, upon payment of the mortgage-money, the mortgagee shall, if required by the mortgagor, enter satisfaction upon the record of the mortgage; which entry shall bar any action brought upon the mortgage, and operate as a complete discharge and release thereof. R. S., 1838, p. 314. There was no propriety in entering satisfaction of this mortgage. The entry contemplated by the law is only made when the mortgage is satisfied by a voluntary payment, and its object is to furnish evidence to defeat any proceeding whatever founded upon the mortgage. The entry in question is no more evidence of the facts stated in it, than would be any loose memorandum of the commissioner stating the same facts.

The instruction asked for by the defendant should have been given to the jury.

On the motion of the lessor of the plaintiff the Court instructed the jury, that so soon as principal or interest became due on the mortgage, the commissioner had a right to sell the

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mortgaged premises; that the jury had a right to find for the plaintiff on the sale under the mortgage without a deed from the commissioner. These instructions were wrong. The first, as we have seen, because the commissioner had no right to sell until the lapse of six months after the interest became due; and the second, because it is the commissioner's deed alone which vests a title in the purchaser.

The defendant produced the book of the school-commissioner containing his accounts in relation to the school funds, in which were the following entries: "*Nov. 22. To cash received of Bladen A. Williamson interest on mortgage \$10.00. Back interest on same \$2.50.*" "*Deduct from B. A. Williamson interest \$13.12½;*" and offered to read the entries [*18] to the jury. There was no evidence that the commissioner was dead, or that his testimony could not be procured. The Court rejected the book; and we think the decision was right. Had there been proof that the testimony of the commissioner could not be had, the entries would have been proper evidence for the consideration of the jury in forming an opinion whether interest due on the mortgage had been paid or not. The commissioner is required by law to keep a separate account of the funds belonging to each congressional township, and of his transactions in relation to the same. *R. S.*, 1838, p. 511. He is a public officer sworn to the faithful discharge of his duties. His book, kept in pursuance of his duty, and containing an entry rendering him liable to its amount, is good secondary evidence (his own testimony not being to be had) of the fact contained in the entry. See *Stead v. Heaton*, 4 T. R., 669; *Goss v. Watlington*, 3 B. & B., 132; *Nicholls v. Webb*, 8 Wheat., 326.

There should have been a new trial granted on account of refusing the instruction asked for by the defendant, and for the misdirection of the Court in giving those which were given on the motion of the plaintiff; and also for another reason. There was no evidence that the defendant was in possession of the premises when the action was commenced. This was essential to a verdict for the plaintiff.

Philbrick v. Goodwin.

Per Curiam.—The judgment is reversed at the costs of the lessor. Cause remanded, &c.

H. S. Lane and *S. C. Willson*, for the plaintiff.

R. C. Gregory and *D. Brier*, for the defendant.

PHILBRICK v. GOODWIN.

TRIAL OF RIGHT OF PROPERTY.—On a trial of the right of property in goods taken in execution, the claimant can not recover unless he prove himself entitled to the immediate possession of the goods.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—This was a trial of the right of property claimed by *Goodwin*. An execution had issued in favour of *Philbrick* against the goods of one *Jackson* and was [*19] levied *on a wagon, &c., found in the latter's possession. There was a trial of the right of property before a justice of the peace, and judgment rendered in favour of the claimant.

On the trial in the Circuit Court on appeal, the claimant gave in evidence a mortgage in his favour on the goods in question, executed by *Jackson* before the execution on which they had been taken was issued. The mortgage stated that before its execution, the mortgagee had become the surety of *Jackson* for the payment of two promissory notes not then due; that if the mortgagor should pay the notes as they became due, and keep the mortgagee harmless, the deed should be void; and that until the forfeiture of the mortgage, the mortgagor should have the use of the property, but should not dispose of it without the mortgagee's consent. The mortgage, at the time of the trial, had not been forfeited, the notes mentioned in it not being due, and the mortgagee having lost nothing by his suretyship. On this evidence, judgment was rendered for the claimant.

As the execution-defendant was in possession of the goods at

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the date of the mortgage, which was before the execution issued, and continued to possess them under the express terms of the mortgage until the time of the trial, the claimant had no right to recover. *Hamilton v. Mitchell*, 6 Blackf., 131.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman and *P. L. Spooner*, for the plaintiff.

E. Dumont, for the defendant.

THE STATE v. BOLT, in Error.

THE manner of selecting the grand jury is not a matter of which the Court can take cognizance, on a motion to quash an indictment. *Bellair v. The State*, 6 Blackf., 104.

[*20]

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CRIMINAL LAW—SEPARATE TRIALS.—If on an indictment against two persons, one of them be tried separately, the record, by showing that the prisoner was separately tried, necessarily shows that the Court directed the trial.

CHARGE OF JURY—PRESUMPTIONS.—If the record of a criminal case show that in the course of the trial, the Court had, on an adjournment from one day till the next, placed the jury in the charge of a bailiff, it will be presumed that the jury was committed to his care in a legal manner, whatever that may be.(a)

MURDER—INDICTMENT.—A count in an indictment for murder stated, that the defendant made an assault on one *G. B.*, and that the defendant with a certain ax, &c., the said *G. B.*, in and upon the *left* side of the head and over the *left* temple of him the said *G. B.*, then and there feloniously and willfully and of his malice aforethought did strike and beat, giving to the said *G. B.*, then and there with the ax aforesaid, in and upon the *right* side of the head of him the said *G. B.*, and over the *right* temple of him the said *G. B.*, one mortal wound, &c., of which said mortal wound the said *G. B.*, &c.,

(a) *Morris v. Graves*, 2 Ind., 354

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on, &c., died, and so the jurors aforesaid, upon their oath aforesaid, do say, &c. *Held*, that the count, in the description of the offense, was repugnant and inconsistent with itself in a material part, and was void.(a)

SAME.—Such count must state the part of the body to which the violence was applied; but the proof need not correspond with the statement.

SAME.—If an allegation in such count be sensible, and consistent in the place where it occurs, and be not repugnant to *antecedent* matter, it can not be rejected as surplusage, although it be repugnant to a subsequent allegation.

SAME—STRIKING OUT.—An objection to such count for repugnancy in the description of the offense, can not be removed by striking out the allegation which is inconsistent with a previous one, unless, after striking out the subsequent allegation, a legal description of the offense will still remain.

SAME.—In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe the depth or breadth of the wound.(b)

SAME.—An indictment in such case concluded as follows: "And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *S. D.* (the prisoner), in manner and form aforesaid, feloniously and willfully and of his malice aforethought did kill and murder, contrary to the form of the statute," &c. *Held*, that this conclusion was insufficient, for not designating the person murdered.

SAME.—Although an indictment charge that the defendant feloniously and willfully and of his malice aforethought did strike the deceased, &c., giving him, &c., a mortal wound, &c., yet if it do not contain the technical allegation that the defendant feloniously *murdered* the deceased, it is an indictment for manslaughter only and not for murder—the word *murder* being a term of art which can not be supplied in an indictment by any other word.(c)

VERDICT.—A verdict against the defendant in manslaughter must fix the punishment.

ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—This was an indictment against *Samuel Dias* and *Hannah Gilman* for the murder of one [*21] *George *Brock*. There are two counts in the indictment. The said *Dias* being arraigned pleaded not guilty, and a jury was sworn to try the issue. The examination of the cause not being finished on the day it was commenced, the jury was placed under the charge of a bailiff, to be returned into Court the next morning. The trial was not

(a) *State v. Dark*, 8 Blackf., 526.

(b) *Dillon v. The State*, 9 Ind., 408.

(c) *Reed v. The State*, 8 Ind., 200.

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concluded on the second day, and the jury was again put in charge of a bailiff who was sworn to attend them, to be returned into Court the following morning. On the third day, the cause was submitted to the jury, who returned a verdict of guilty. Motions for a new trial and in arrest of judgment were made and overruled, and judgment rendered that the prisoner *Dias* be executed.

The first error assigned is, that the record does not show an order of the Court for the separate trial of the prisoner. There is nothing in this objection. The record, by showing, that the prisoner was tried separately, necessarily shows that the Court directed the trial.

It is also assigned for error, that the record does not show that the bailiff, to whose care the jury was intrusted on the first adjournment of the Court, was sworn. In support of this objection, we are referred to the case of *The King v. Stone*, 6 T. R., 527. There the entry of adjournment states, that the bailiffs who took charge of the jury were sworn; but the case does not show that it would have been error had the oath been omitted, or had the record not shown that it was administered. This Court reversed a judgment against a prisoner in a capital case, because there was no entry of record, from which it could be implied that the jury had been legally disposed of during an adjournment of the Court. *Jones v. The State*, 2 Blackf., 475. But that was a different case from the present. There is here an entry of record that, on the adjournment, the jury was placed in charge of a bailiff, to be returned into Court the next morning; and we must presume from that entry, that the jury was committed to the care of the bailiff in a legal manner, whatever that may be.

The last error assigned is, that both the counts in the indictment are insufficient.

The first count, so far as it is necessary to state it, is as follows: That *Samuel Dias*, late of, &c., and *Hannah* [*22] **Gillman*, late of, &c., on, &c., with force and arms, at, &c., in and upon one *George Brock*, &c., did make an assault, and that the said *Samuel Dias* and the said *Hannah*

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Gillman, with a certain ax, &c., the said *George Brock* in and upon the *left* side of the head and over the *left* temple of him the said *George Brock*, then and there feloniously and willfully and of their malice aforethought did strike and beat, giving to the said *George Brock* then and there, with the ax aforesaid, in and upon the *right* side of the head of him the said *George Brock*, and over the *right* temple of him the said *George Brock*, one mortal wound of the depth of three inches and of the breadth of six inches, of which said mortal wound the said *George Brock*, &c., on, &c., died; and so the jurors aforesaid upon their oath aforesaid do say, &c. The objection made to this count is, that, in the description of the offense, it is repugnant and inconsistent with itself. The charge is, that the persons indicted struck the deceased with an ax on the *left* side of the head and over the *left* temple, giving to him then and there, with said ax, on the *right* side of the head and over the *right* temple, a mortal wound.

There is in this part of the count a manifest repugnancy in the description of the offense as to the place of the wound; the first part of the sentence, viz., that the persons indicted struck the deceased with an ax on the *left* side of the head, &c., being inconsistent with what follows, viz., their giving him then and there with said ax on the *right* side of the head, &c., a mortal wound. And this repugnancy occurs, as it must occur to be fatal, in a material part of the count, for the part of the body to which the violence was applied must be stated, and even if the wound be alleged to have been on the arm, hand, &c., without saying whether the right or left, the indictment is bad. The proof, to be sure, need not correspond in this respect with the allegation, but the allegation itself can not be dispensed with in the indictment. 3 Chitt. Cr. L., 735; Arch. Cr. Pl., 384. The defect can not be remedied by treating the first statement as to the part of the head of the deceased which was struck, as superfluous, because that statement is sensible and consistent in the place where it occurs, and is not repugnant to antecedent matter. 1 Chitt. Cr. L., 224; *The King v Stevens et al.*, 5 East, 244. *Nor can the difficulty be removed

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by considering as superfluous the subsequent allegation as to the persons indicted giving to the deceased, on the opposite side of his head, the mortal wound. If this latter allegation were left out, the count, as to the matter in question, would read as follows: That the said *Samuel Dias* and the said *Hannah Gillman*, with a certain ax, &c., the said *George Brock*, in and upon the *left* side of the head and over the *left* temple of him, the said *George Brock*, then and there feloniously, &c., did strike and beat, giving to the said *George Brock* then and there, with the ax aforesaid, one mortal wound. In that case, the necessary allegation relative to the giving of the deceased a mortal wound would be defective, for not setting out the part of his person on which such wound was given, the word "there" in the sentence having reference only to the venue. There being then a repugnancy in a material charge of the count in question, which can not be avoided by striking out a part as superfluous, the count can not be sustained. 2 Hawks. Pl. Cr., 228; 1 Chitt. Cr. L., 237; Arch. Cr. Pl., 51; *Rex v. Stevens*, 5 East, 244.

The second count is objected to on account of an alleged defect in its conclusion. This count is similar to the first until it comes to the conclusion commencing with the words, "And so the jurors aforesaid," &c., except that it does not state the length and breadth of the wound, which it was not necessary to state, *Rex v. Tomlinson*, 6 Carr & Payne, 370, and except that it is not subject to any objection for repugnancy. The conclusion objected to is as follows: "And so the jurors aforesaid upon their oath aforesaid do say, that the said *Samuel Dias* and the said *Hannah Gillman*, in manner and form aforesaid, feloniously and willfully and of their malice aforethought did kill and murder, contrary to the form of the statute," &c. The defect here complained of is, that the person murdered is not designated. This defect is believed to be fatal. The averment that the persons indicted, feloniously and willfully and of their malice aforethought, did kill and murder, without anything more, does not amount to any charge against them which the law can recognize. The consequence is, that the count is left

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without the technical allegation, that the persons indicted feloniously, &c., *murdered the deceased. It [*24] is true, that the previous part of the count charges that the persons indicted, feloniously and willfully and of their malice aforethought, did strike the said *George Brock*, &c., giving him, &c., three mortal wounds, &c.; but the law is well settled, whether wisely or otherwise we need not stop to inquire, that such description of the offense is not sufficient in a count of an indictment for murder. There must be in such count an express allegation, that the prisoner feloniously, &c., *murdered* the deceased, the word murder being a term of art which can not be supplied by any other word. The language of *Hawkins* on the subject is as follows: "No periphrasis or circumlocution whatsoever will supply those words of art, which the law has appropriated for the description of the offense, as *murdravit*, in an indictment for murder; *cepit*, in an indictment for larceny; *mayhemavit*, in an indictment for maim; *felonice*, in an indictment of any felony whatever," &c. 2 Hawks. Pl. Cr., 224. The same doctrine is laid down in *Long's* case, 5 Coke, 245; 1 Chitt. Crim. L., 239 to 244; 4 Blacks. Comm., 306, 307; 3 Bac. Abr., 554.

The conclusion to the second count, as before noticed, being a nullity, and there being no technical allegation in the count that the persons indicted feloniously, &c., *murdered* the deceased, the following authority is applicable to the case: "An indictment was removed into B. R. s. 'That of malice aforethought, *A B* made an assault on *C D*, and the same *C D* feloniously struck, giving him one mortal stroke of which he languished for seven days, and on the eighth day of the stroke aforesaid died,' without saying 'and so the aforesaid *A B*, the said *C D* feloniously did kill and murder.' Therefore this word *murder* is wanting in the indictment. And whether this shall be adjudged *murder*, or only manslaughter, was doubted on account of the general pardon passed in the late parliament, in which murder is excepted. And at length it was resolved by the Justices of B. R. and others, that without this word *murder* it is only manslaughter." *Anon.* 3 Dyer, 304. That

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case, which is directly against the count in question, occurred as early as the time of *Elizabeth*, and has been ever since adhered to.

We are of opinion, therefore, that the second count [*25] does *not contain a valid charge of murder, but that it is a good count for manslaughter.

As the first count of the indictment is bad, and the second contains a charge of manslaughter only, the judgment that the prisoner *Dias* be executed is erroneous; and for the same reason the verdict is wrong for not fixing the punishment. R. S., 1838, p. 219, sect. 78.

Per Curiam.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

J. H. Henry and *S. G. Dodge*, for the plaintiff.

A. A. Hammond and *J. P. Usher*, for the State.

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PERJURY—INDICTMENT.—If an indictment for perjury show that the testimony alleged to be false was material to the issue, an express allegation that it was material is unnecessary.(a)

SAME—WAIVER.—The indictment in such case alleged the perjury to have been committed on a trial before a justice and a jury of six men. The trial seemed to have been with consent of parties. Held, that the consent was a waiver of whatever irregularity there might have been as to the jury.

ERROR to the *Montgomery* Circuit Court.

SULLIVAN, J.—This was an indictment for perjury. The allegations in the indictment are, that the defendant, *Hall*, commenced an action of debt against one *Cline* before *William Gray*, a justice of the peace, for the sum of \$27.50; that *Cline* filed as a set-off a demand he held against *Hall* for ninety-nine bushels of corn of the value of \$24.81; that to try the issue between the parties, a jury of six men was impaneled, and

(a) *The State v. Floyd*, 25 Ind., 243.

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that upon such trial *Cline* called upon *Hall* to give testimony as a witness in the cause; that *Hall* was thereupon duly sworn by the justice to give evidence, &c., he, the said *Gray*, then and there having competent authority to administer said oath; that upon the trial of the cause, certain questions became and were material to the issue, viz.: How much corn the said *Hall* had received from said *Cline*, &c.; that *Hall* being so sworn, &c., intending, &c., did falsely, willfully, &c., depose and swear to and before said jurors, and to and before the said [*26] *Gray*, justice as aforesaid, as follows, viz., &c. The perjury is then assigned, and the indictment concludes in the usual form. The Court quashed the indictment, and the State prosecutes this writ of error.

The defendant insists that the Circuit Court did right in quashing the indictment, because, 1, It does not allege, in positive terms, that the evidence given was material to the issue. We think the objection is not well founded. The indictment avers the materiality of certain questions, and sets out the testimony of the defendant in relation to those facts, and then avers that it was false. This is according to the precedents, and is sufficient. Moreover, it is not necessary in all cases that an indictment for perjury should contain an express averment that the false allegations are material to the issue. Their materiality, in the absence of an express averment, may appear from the necessary bearing they have on the matter in issue. If the testimony is shown to be important to the question at issue between the parties, the express allegation may be omitted. 2 Chitt. C. L., 309.

The second reason given in support of the judgment of the Circuit Court is, that the cause in which the alleged perjury was committed was tried by a jury of six men; that a jury composed of six men in such a case was wholly unauthorized by the law; and that the proceedings were therefore illegal and void. By the common law, false swearing to amount to perjury must be in a judicial proceeding, and in a Court or before an officer having competent authority to administer an oath. Our statute is more comprehensive, and a false oath or state-

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ment of any nature, or for any purpose whatever, willfully and corruptly taken before an officer authorized to administer oaths, is, by it, declared to be perjury. Where the false swearing was in the course of a judicial proceeding, we do not think it essential to the commission of the offense of perjury, that all the proceedings on the trial should be strictly regular. It is essential, however, that the Court have jurisdiction of the subject-matter, and power to administer an oath to the witness. If the proceedings were not so far irregular as to be a mistrial, the false swearing would amount to perjury. The jury of six men that was impaneled to try the cause, in which the [*27] perjury in this case is said to have *been committed, seems to have been with the consent of the parties to the suit, and whatever irregularity there might have been in trying the cause with such a jury was waived by their consent.

We see no valid objection to the indictment, and think the Court erred in quashing it.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

S. C. Willson, for the State.

D. Mace, for the defendant.

THE STATE, on the Relation of the BOARD OF COUNTY COMMISSIONERS, &c., v. POLKE and Another.

ALTERATION OF CONTRACT—DISCHARGE OF SURETY.—Debt of the State, on the relation of the board of county commissioners, &c., on the official bond of a county agent, against *Polke* and *Vanpelt*. Plea, that the bond was executed by the agent, with *Polke*, *Evans*, and *Burnside*, sureties, and was delivered to the board of county commissioners; that, afterwards, the commissioners, while the bond was under their control, caused the name of *Evans* to be erased from the same, and that of *Vanpelt* added thereto, without the knowledge or consent of *Polke* or *Burnside*. Held, that the plea was good. (a)

(a) *Bourser v. Rendell*, 31 Ind., 132; *Grimes v. Piersol*, 25 Id., 246.

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ERROR to the *LaPorte* Circuit Court. The defendants below were *Polke* and *Vanpelt*.

SULLIVAN, J.—Debt on the official bond of the county agent for the county of *LaPorte*. The defendants pleaded *non est factum*, and two special pleas. The special pleas are substantially the same, and aver that the bond sued on was given by one *David Dinwiddie*, conditioned for the faithful performance of the duties of the office of agent for the county of *LaPorte*, and was signed by the defendant *Polke* and one *David Evans* and one *Andrew Burnside* as his sureties, and was delivered to and accepted by the board of commissioners of the county of *LaPorte*, and was by them duly filed, &c.; that afterwards, and while said bond remained so on file, and in the possession and under the control of said county commissioners, they, the said commissioners, at and during a session of said board, on, &c., caused the name of the said *David Evans*, one of the original signers to said bond, to be erased therefrom without [*28] the knowledge, consent, or *ratification of said *Polke*, and the name of one *Vanpelt* to be added thereto, without the knowledge of said *Polke* and *Burnside*, and without their consent, or the consent of either of them, &c. There were general demurrers to the pleas, and the demurrers were overruled. Judgment for the defendants.

We are not called upon to decide at this time whether *Vanpelt*, in a suit properly brought, can be held responsible by virtue of his signing and sealing the bond. If we admit that the signature of *Vanpelt*, with the concurrence of the principal obligor, and of the board of commissioners, binds him according to the terms of the bond, it still leaves untouched the question whether the erasure of the name of *Evans*, without the consent of *Polke*, was such a material alteration in the original bond as to make it void as to *Polke*.

It is a general rule that any alteration of a bond after its execution, in a material point, by the obligee will avoid the bond, and it is even said that an alteration by the obligee in an immaterial part will have the same effect. *Pigot's case*, 11 Co., 26; *Whelpdale's case*, 5 Co., 118. But this rule is so

 Miller and Another v. Ashton and Another.

modified, that it does not apply to cases where the alteration has been made with the consent of all the parties to the deed. 2 Lev., 35; *Smith v. Crooker et al.*, 5 Mass. R., 538; *Speake et al. v. The U. States*, 9 Cranch, 28; *Penny v. Corwith*, 18 J. R., 499. In the case of *Adams et al. v. Bateson*, 6 Bing., 110, the point was made but not decided. The case of *Speake et al. v. The United States*, *supra*, was, in its leading features, very similar to the one under consideration, except that the erasure was with the consent of all the parties to the deed. The consent appearing on the record, the Court held that the alteration did not vitiate the bond, but the whole argument of the Court shows, that if consent had not been given it would have been void.

We concur in the opinion, that the erasure of the name of one of the obligors to a bond is a material alteration. It is no longer the same bond. Moreover, *Polke*, in the present case, may have had reasons for refusing to be bound in a bond with *Vanpelt*, while he was willing to be so bound with *Evans*.

As the pleas show that the alteration was made by the board of commissioners, for whose use the bond was
 [*29] given, *without the consent of all the obligors, we are of opinion that they are sufficient to bar the action, and that the demurrers were properly overruled.

Per Curiam.—The judgment is affirmed at the costs of the relator.

J. H. Bradley, for the plaintiff.

J. B. Niles, for the defendants.

MILLER and Another v. ASHTON and Another.

LEVY OF EXECUTION, WHEN ILLEGAL.—Debt on a delivery bond. Plea, that the bond was without consideration in this: That, on, &c., a *fi. fa.* issued on a judgment in favour of the plaintiff against A., one of the defendants, and was, by A's consent, levied on certain land (here described), which was appraised under the statute of 1841, and which was more than

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sufficient, if sold at half its appraised value, to pay said judgment and all costs; that the sheriff, without selling the land or disposing of the levy, levied said execution on the goods named in the delivery-bond, and was about to sell the same without first selling the land; whereupon the defendants, to prevent the sale, gave the bond. *Held*, that the plea was valid.(a)

ERROR to the *LaPorte* Circuit Court. The plea in this case shows, that the levy on the real estate and the appraisement were made in 1841, when such estate could not be sold on execution for less than one-half of its appraised value.

SULLIVAN, J.—Debt by *Ashton* and *Teall* against *Miller* and *Miller* on a delivery bond. Plea, that the bond was given without any good or valuable consideration in this, to wit, that on, &c., a *fiery facias* was issued from the *LaPorte* Circuit Court on a judgment in favour of *Ashton* and *Teall* against *S. Miller*, one of the plaintiffs in error, which, by the consent of *Miller*, was levied on certain tracts of land described in the plea, which were appraised according to the statute, and which were more than sufficient, if sold at one-half of their appraised value, to pay the judgment on which said execution issued and all costs; that the sheriff, without selling said lands, or in any wise disposing of said levy, did, afterwards, to wit, on &c., seize and take in execution, by virtue of said writ, the goods and chattels named in the condition of said bond, and was

about proceeding to sell the same without first selling
 [*30] said lands, &c.; wherefore the *defendants, to prevent the sale, executed said bond, &c. Demurrer to the plea, and demurrer sustained. The damages were thereupon, by consent of parties, assessed by the Court, and judgment rendered for the plaintiffs.

The defense set up in the plea was sufficient to bar the action. In *Laselle v. Moore*, 1 Blackf., 226, it was decided, that, where the real estate of a defendant was held by a *renditioni exponas*, the plaintiff could not take out an execution of *fiery facias* and levy on other property; and that if he did so, the Court would set aside such execution as illegal. In the subsequent case of

 (a) *Doe v. Dutton*, 2 Ind., 309.

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McIntosh et al. v. Chew et al., Id., 289, the Court say, that goods or lands taken in execution must be considered as a satisfaction of the judgment debt, and may be pleaded in bar of any other action against the same defendant for the same demand, until their insufficiency is made manifest by a sale and return.

If a levy on land sufficient to pay a judgment be, until it is legally disposed of, a satisfaction of the judgment, it follows that another levy by virtue of the same writ, after a levy sufficient to pay the debt has been made, is illegal until the first levy is disposed of, and would for that reason be set aside on motion.

According to the second section of the act subjecting real and personal estate to execution, R. S., 1838, p. 276, whenever an execution shall issue against the goods and chattels, lands and tenements, of any defendant, it is made the duty of the sheriff to levy such execution upon such part of the defendant's estate as he may direct, provided there be no doubt as to the defendant's title to the property so selected. Whatever the object of that statute may be, it would undoubtedly defeat it, if a sheriff may at his pleasure abandon a levy made according to the direction of the defendant, and levy upon other property against his consent.

We are of opinion, therefore, that from the previous decisions of this Court, as well as from a fair construction of the statute, the seizure of the goods of *S. Miller* by the sheriff was, under the circumstances, an illegal act; that it gave him no right to the goods; and that the bond for the delivery of the property can not be enforced.

[*31] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Bradley and *J. A. Liston*, for the plaintiffs.

A. L. Osborn, for the defendants.

Addleman v. Mormon.

ADDLEMAN v. MORMON.

VENDOR AND PURCHASER—INJUNCTION.—A vendee of real estate filed a bill in chancery to restrain the vendor from the collection of the purchase-money, until the latter should pay off a mortgage on the land according to his agreement. *Held*, that it was not essential to the success of the suit that the complainant should have tendered back to the defendant a deed for the land, nor that he should have offered to account for the rents and profits.^(a) SAME.—A bill in chancery to enjoin a judgment at law can not be sustained, unless there be a release of errors indorsed on the bill.^(b)

ERROR to the *Wayne* Circuit Court.

SULLIVAN, J.—This was a bill in chancery by *Mormon* against *Addleman* for an injunction. The bill states that *Addleman* sold and conveyed to *Mormon* a tract of land in the county of *Wayne* at and for the sum of \$1,200, to be paid in four equal annual installments; that at the time of the sale, the land was incumbered by a mortgage previously executed by *Addleman* to one *Roderfield*, which *Addleman* then agreed with the complainant should be paid off; and, at the request of *Mormon*, obtained and delivered to him the bond of one *B. W. Addleman* in the penalty of \$1,500 that the incumbrance should be removed; that the mortgage-money to *Roderfield* has not been paid; and that he threatens to sell said land; that the land is not more than sufficient to pay the debt to *Roderfield*; that the defendant is unable to pay his debts; and that the surety, *B. W. Addleman*, is insolvent, &c. The bill then states that *Addleman* had obtained a judgment at law against *Mormon* for the sum of \$300, that being the amount of the first payment for said land, and threatens execution, &c. The prayer of the bill is, that the defendant may be enjoined from proceeding on said judgment at law, and from the collection of the balance of the purchase-money for said land, until he shall have paid off said mortgage, &c.

(a) *Warren v. Carey*, 5 Ind., 319; 18 Id., 339.

(b) *Dickerson v. The Board, &c.*, 6 Ind., 128.

Addleman v. Mormon.

[*32] *At the *March* term, 1841, the defendant moved the Court to dissolve the injunction which had been granted at a previous term, but the motion was overruled. He then demurred to the bill, but the demurrer was also overruled, and having failed to answer, the bill was taken as confessed, and a decree was entered according to the prayer of the bill.

This bill does not seek to rescind the contract entered into between the parties. The object of it is rather to enforce it; and it seeks only to restrain the vendor from the collection of the purchase-money until he shall have performed what he bound himself to do. It was, therefore, not necessary that the complainant should tender back to the defendant a deed for the land, nor that he should offer to account for the rents and profits, as is contended by the plaintiff in error.

Notwithstanding the complainant has merits in his case, we think the Court erred in refusing to dissolve the injunction as it respects the judgment at law. The statute requires that no injunction shall be granted to stay proceedings on a judgment at law, unless there be indorsed on the bill a release of all errors in the judgment prayed to be enjoined. The release of errors so to be indorsed is essential to the sufficiency of the bill, and constitutes a part of the record. In this case it does not appear that a release of errors was indorsed on the bill. This should have appeared, and not appearing the decree is erroneous so far as it enjoins the judgment at law. As to the residue of the purchase-money the decree is right.

Per Curiam.—That part of the decree which enjoins the proceedings on the judgment is reversed, and that part which enjoins the collection of the residue of the purchase-money, is affirmed, &c.

J. S. Newman, for the plaintiff.

C. H. Test, for the defendant.

 Bell v. The State, on the Relation of Parks and Another.

[*33] *BELL v. THE STATE, on the Relation of PARKS and Another.

OFFICIAL BOND—PLEADING.—Debt by the State, on the relation, &c., on a justice's bond against him and his surety. Plea, general performance. Replication, assigning as a breach the justice's failure to pay over money collected. Rejoinder, that the relator had recovered a judgment against the justice for the same money. *Held*, that the rejoinder was a departure. *Held*, also, that such judgment, unless satisfied, was no bar to a suit on the bond against the justice and his surety. *Held*, also, that though the justice's bond was conditioned for the payment, *on demand*, of the money collected, a general averment in the replication of non-payment *although often demanded*, was sufficient on general demurrer.

PRACTICE—JOINT DEFENDANTS.—A judgment against one defendant, in an action on contract against two, is erroneous, unless there be a suggestion of "not found" as to the other.

 ERROR to the *Rush* Circuit Court.

DEWEY, J.—Debt by the State, on the relation of *Parks* and another, against a justice of the peace and his surety on his official bond. The declaration is founded on the penal part of the bond. *Bell*, one of the defendants below, craved *oyer* of the bond and condition. The latter is in the usual form, for the faithful discharge, by the other defendant, *Watson*, of the duties of a justice of the peace, and for the payment over on demand of all moneys collected, &c. *Bell* pleaded, first, performance by *Watson* of all his duties as a justice of the peace, according to the condition of the bond; and, secondly, that *Watson* was not a justice of the peace. The plaintiff replied to the first plea, that the relators had recovered before *Watson*, as a justice of the peace, three certain judgments, which, at, &c., on, &c., had been paid to him, and that he, at, &c., had refused to pay the money so collected to the relators, although they and their agent had often demanded it of him. The defendant, *Bell*, rejoined, that the relators had sued *Watson* for the same money named in the replication, and had recovered a judgment against him for it. The plaintiff demurred, and assigned for causes of demurrer, among others,

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that the rejoinder was a departure from the plea; and that it did not aver that the judgment recovered by the relators against *Watson* was satisfied. The Court sustained the demurrer. Damages were assessed, and a final judgment was rendered for the plaintiff. There was no appearance by *Watson*, nor a return of not found as to him suggested.

[*34] *The decision upon the demurrer is right. The rejoinder is clearly a departure from the plea. The plea alleges performance by *Watson* of all his duties as a justice of the peace according to the condition of the bond; but the rejoinder admits a failure in the discharge of his duty in not paying over money collected by him, and places the defense on new ground, which is, that the relators had recovered a judgment against *Watson* for the same money demanded in this cause.

We are of opinion, too, that the rejoinder is substantially bad for the other cause of demurrer, that is, because it does not aver satisfaction of the judgment recovered by the relators against *Watson*. We do not think that an unsatisfied judgment against a justice of the peace, recovered by an individual in consequence of some failure on the part of the justice in the discharge of his duty, is a bar to an action on his bond against him and his sureties, though the merits of the first action are involved in the second. The remedies are concurrent, and both may be pursued until one satisfaction be obtained.

The plaintiff in error contends that the replication is bad, for not averring a special demand on the justice to pay the money collected by him, his bond requiring him to pay only on demand. In *Bowdell v. Parsons*, 10 East, 359, which was an action of *assumpsit* on a promise to deliver hay to the plaintiff on request, the breach assigned was, that the defendant, although often requested by the plaintiff to deliver the hay had refused to do so. The Court held that the omission to state the time and place of making the request (there being a venue laid in a preceding part of the declaration), was matter of form, and could be reached only by a special demurrer. The decision was founded upon the statute of *Anne*, which

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enacts, "that in all cases where any demurrer shall be joined, &c., the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, &c., declaration, or other pleading, &c., except only those which the party demurring shall specially and particularly set down and express as cause of demurrer," &c.

The thirty-third section of our practice act contains a [*35] similar provision; R. S., 1838, p. 452; and we *think its effect is to cure the formal defect of omitting the time and place of making the request. The request itself is alleged, and that, too, immediately after an averment, containing both venue and time, that the justice had received the money.

There was, however, an error committed in rendering judgment against one of the defendants, without there being a suggestion of not found as to the other. This must reverse the judgment. And it should be remarked that the second plea was entirely overlooked. It stands unanswered.

Per Curiam.—The judgment is reversed at the costs of the relators. Cause remanded, &c.

J. S. Newman and *G. B. Tingley*, for the plaintiff.

R. S. Cox and *P. A. Hackleman*, for the defendant.

EARLY v. FOSTER and Another.

INDORSEMENT OF NOTE IN BLANK.—An indorsement in blank by a third person of a promissory note, negotiable, &c., made at the date of the note, does not, of itself, render the indorser liable, as a maker, to the payee.^(a)

SAME.—But as the indorsement may be made under such circumstances as to render him so liable, a note thus indorsed is admissible evidence in a suit by the payee against such indorser and the maker, as joint makers, as a link in the chain of the plaintiff's evidence.

^(a)See 21 Ind., 433; 13 Id., 554; 6 Id., 162.

Early v. Foster and Another.

ERROR to the *LaPorte* Circuit Court.

DEWEY, J.—This was an action of assumpsit by *Early* against *Foster* and *Wells*. The first count of the declaration sets out a negotiable promissory note made by *Foster* to the plaintiff, and indorsed at its date in blank by *Wells*; and lays a joint promise by *Foster* and *Wells* to pay the plaintiff “the amount of the note according to its tenor and effect.” The second count is on a joint negotiable promissory note made by *Foster* and *Wells* to the plaintiff. There are other counts in the declaration which need not be stated. The defendants demurred generally to the first count, and pleaded the general issue to the others. The Court sustained the demurrer, and on the trial of the issues of fact rendered a judgment for the defendants. The plaintiff offered in evidence, under the second count, a negotiable promissory note made by *Foster* [*36] *to the plaintiff, and indorsed by *Wells*, which corresponded in date, amount, and in the time and place of payment, with that described in the second count. Its admission being objected to by the defendants, it was rejected.

The demurrer to the first count was correctly sustained. That count contained no cause of action against *Wells*, whose mere unexplained indorsement of the note, made at its date, did not render him primarily liable, as a joint maker, to the payee; *Wells v. Jackson*, 6 Blackf., 40; and he is not shown to be responsible as an indorser, so as to render him jointly liable with the maker, under the statute.

But the Court erred in rejecting the note which the plaintiff offered in evidence under the second count. That count was founded on a joint promissory note made by *Foster* and *Wells* to the plaintiff. Though the indorsement of the note by *Wells* did not, of itself, render him liable as a maker, yet he may have indorsed it under such circumstances as showed his intention to have been to assume a joint primary responsibility with *Foster*. The plaintiff had a right to show that such was the fact; and to enable him to do so, the note was a necessary link in the chain of his evidence. *Wells v. Jackson*, before cited.

The President, &c., of the Town of Fort Wayne, &c., v. Jackson and Others.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. W. Chapman, for the plaintiff.

J. B. Niles, for the defendants.

THE PRESIDENT and TRUSTEES of the TOWN of FORT WAYNE,
for the Use, &c., v. JACKSON and Others.

VARIANCE.—A bond sued on was described in the declaration as payable to “The President and Trustees of the Town of *Fort Wayne*.” The bond shown on *oyer* was payable to “The President and Trustees of the *Fort Wayne* corporation.” *Held*, that the variance was fatal.

MUNICIPAL CORPORATION—PLEADING.—A corporation suing in its true name, on a bond executed to it by a wrong name, should aver in the declaration that the defendant bound himself to the plaintiff by the name contained in the bond.

SAME.—The corporation of “The President and Trustees of the Town of *Fort Wayne*,” is merged in the corporation of “The City of *Fort Wayne*,” a bond executed to the former corporation is transferred to and vested in the latter; and a suit on such bond should be brought in the name of “The City of *Fort Wayne*.”(a)

ERROR to the *Allen* Circuit Court.

DEWEY, J.—This was an action of debt commenced by *The President and Trustees of the Town of Fort Wayne* against *Wick, Lewis, Jackson, and Brackenridge*. The action was founded on a bond executed by *Wick* and *Lewis*, as auctioneers within the corporation of the town of *Fort Wayne*, and by *Jackson* and *Brackenridge* as their sureties. The bond, as described in the declaration, was in the penalty of \$1,000, payable to *The President and Trustees of the Town of Fort Wayne*, and conditioned for the faithful performance, by *Wick* and *Lewis*, of their duties as auctioneers. The breach assigned was their failure to pay to *McQuaed*, on demand, a sum of money they had received in their official character for goods, sold by them, belonging to him. A return of not found as to *Wick* was suggested. The

(a) *The Eaton, &c., R. R. Co. v. Hunt*, 20 Ind., 36; 10 Id., 358.

The President, &c., of the Town of Fort Wayne, &c., v. Jackson and Others.

other defendants craved *oyer* of the bond and demurred generally. The bond given in *oyer* was in the penalty of \$1,000, and was payable to *The President and Trustees of the Fort Wayne corporation*. The Court sustained the demurrer, and entered final judgment for the defendants.

This decision was correct. There was a variance between the bond declared on, and that given in *oyer*, in the name of the corporation. The true name of the corporation of *Fort Wayne* was, under the statute respecting the incorporation of towns, *The President and Trustees of the Town of Fort Wayne*. By that name the plaintiffs sued, and had they been entitled to sue at all, they should have averred in the declaration that the defendants were bound to them by the name in the bond, to wit, *The President and Trustees of the Fort Wayne corporation*. *Madison Insurance Company v. Stangle*, 6 Blackf., 88.

But we are of opinion that there is no such corporation as that, in the name of which the suit was brought. The statute, under which that corporation once existed, contains an express reservation in the Legislature of the right to repeal the act, or to dissolve the corporation. The act to incorporate *The City of Fort Wayne* is declared to be a public statute, and we are bound to notice it without its being pleaded.

[*38] *The forty-third and forty-fourth sections merge the old corporation of *The President and Trustees of the Town of Fort Wayne* in the new one of *The City of Fort Wayne*; and the forty-third section transfers to, and vests in, the latter, all books, papers, moneys, property, and effects which belonged to the former. Local laws of 1840, p. 16. This provision transferred the bond on which this suit was founded to *The City of Fort Wayne*, in which name the suit should have been brought.

Per Curiam.—The judgment is affirmed with costs.

H. Cooper, for the plaintiffs.

C. W. Ewing and *R. Brackenridge*, for the defendants.

Bond v. Brady.

TAYLOR v. BLOUNT.

COSTS.—In trover commenced in the Circuit Court, when the demand does not exceed \$50.00, the plaintiff, though he recover, must pay the costs.

ERROR to the *Huntington* Circuit Court.

BLACKFORD, J.—This was an action of trover commenced in the Circuit Court. Damages claimed, \$50.00. Verdict for the plaintiff for \$17.00. Judgment for the amount of the verdict, but that the plaintiff pay the costs.

The plaintiff contends that the judgment against him for costs is erroneous.

Justices of the peace have jurisdiction in actions of trover to the amount of \$50.00. If such suit be commenced in the Circuit Court, and the damages demanded do not exceed \$50.00, the plaintiff, though he recover, shall pay the costs. R. S., 1838, p. 364, sect. 18.

This suit being commenced in the Circuit Court, and the damages claimed being only \$50.00, the judgment against the plaintiff for costs is correct.

Per Curiam.—The judgment is affirmed with costs.

H. Cooper, for the plaintiff.

C. W. Ewing and *R. Brackenridge*, for the defendant.

[*39]

***BOND v. BRADY.**

WITNESS.—In debt against a constable for an escape on execution, the execution-debtor is a competent witness for the constable.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of debt, commenced before a justice of the peace against a constable for an escape on execution. There were five pleas, the second and fifth of which were struck out on the plaintiff's motion. The first plea was *nil debet*; the third, that the execution-defendant,

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Aydelott, was discharged from custody by the license of the plaintiff; and the fourth, that said *Aydelott* was discharged by order of the plaintiff's attorney. The justice gave judgment for the defendant. The plaintiff appealed to the Circuit Court, and judgment was there also given for the defendant.

The plaintiff makes two objections to the judgment. The first is, that a motion by the plaintiff to suppress the deposition of *Aydelott*, taken by the defendant, was improperly overruled. The second is, that the evidence did not support the judgment.

The plaintiff contends that the deposition of the execution-defendant should have been suppressed, on the ground of his being interested. We think, however, that the witness was competent. This being an action of debt against the officer for an escape on execution, the plaintiff, if he succeed, will recover his whole debt, and can have no recourse afterwards against the execution-defendant. *Bonafons v. Walker*, 2 T. R., 126. It follows that the execution-debtor can have no interest in defeating the suit.

The second objection to the judgment is unfounded. Taking the deposition objected to into consideration, as we must do, the evidence in the record is clearly in favour of the defendant.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, for the plaintiff.

J. B. Julian, for the defendant.

[*40] *JAQUES v. DENEHIE and Another.

COMPROMISE OF SUIT—PLEA IN BAR.—Debt on a replevin-bond against *A* and *B*. Plea, that, after the suit was commenced, the same had been, on, &c., settled and compromised by the parties; and that it was then agreed by the plaintiff and *A*, that the suit should be dismissed at the defendants' costs; which costs, amounting to \$6.09, *A* had paid according to the agreement; which the defendants were ready to verify. *Held*, that the plea was bad.

Jaques v. Denchie and Another.

ERROR to the Vigo Circuit Court.

BLACKFORD, J.—Debt by *Jaques*, assignee of *Strain*, against *Denchie* and *Biggs*, on a replevin-bond. The defendants pleaded, *inter alia*, as follows: They say *actio non*, because they say that since the commencement of this suit, the same has been, on, &c., settled and compromised by and between the parties, and that it was then agreed by and between said *Jaques* and said *Denchie*, that said suit should be dismissed at the defendants' costs, which costs, amounting to \$6.09, said *Denchie* has paid according to said agreement; and this they are ready to verify. General demurrer to the plea; demurrer overruled, and judgment against the defendants for costs.

The plea in question is pleaded in bar of the action generally, but it shows that the matter contained in it arose after the action was brought; it could, therefore, if otherwise unobjectionable, be pleaded only in bar of the further maintenance of the suit. *Le Bret v. Papillon*, 4 East, 502; *White et al. v. Guest*, 6 Blackf., 228.

But the plea is bad on other grounds. If it be viewed as a plea that the damages claimed had been satisfied, it is objectionable for not showing the terms of the settlement relied on; that is, whether the satisfaction was by payment of money, or by the delivery and acceptance of property. If the plea be considered as alleging that the settlement consisted of an agreement by the plaintiff to dismiss the suit at the defendants' costs, it is bad as being pleaded in bar, and containing, at most, only matter in delay of the plaintiff's recovery; for were the suit to be dismissed, the defendants could be sued again for the same demand.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. W. Barbour, for the plaintiff.

A. Kinney and *S. B. Gookins*, for the defendants.

McHenry and Another v. Duffield.

[*41] *McHENRY and Another v. DUFFIELD.

CONTRACT BY OFFICERS—PLEADING.—*Duffield* brought an action of debt against *McHenry*, *Tilford*, and *Ratts*. The first count was on an instrument of writing, by which, as alleged, the defendants acknowledged themselves to be indebted to the plaintiff in a certain sum of money, on settlement, in full for joiner's work of the *New Washington Seminary*. The second count was founded on an instrument of writing in the following words: "April 6th, 1842. Due *John H. Duffield*, on settlement, the sum of \$239 in full for the joiner's work of the *New Washington Seminary*. (Signed) *James McHenry*, *R. Tilford*, *F. Ratts*, Building Comm., in behalf of the Trustees of the *New Washington Seminary*." Held, that such an instrument of writing as that set out in the second count, did not sustain the first count; and that the second count showed no cause of action against the defendants. Held, also, that if the defendants were authorized to execute the instrument for the trustees, the suit should have been against the trustees; and if the defendants were not so authorized, they were liable in an action on the case for acting in the matter without authority. (a)

ERROR to the *Clark Circuit Court*.

BLACKFORD, J.—This was an action of debt in which *Duffield* was plaintiff, and *McHenry*, *Tilford*, and *Ratts*, were defendants. There are two counts in the declaration. The first is founded on an instrument of writing by which, as the count alleges, the defendants acknowledged themselves to be indebted to the plaintiff in a certain sum of money, on settlement, in full for joiner's work of the *New Washington Seminary*. The second count is founded on an instrument of writing as follows: "April 6th, 1842. Due *John H. Duffield*, on settlement, the sum of \$239 (in full) for the joiner's work of the *New Washington Seminary*. (Signed) *James McHenry*, *R. Tilford*, *F. Ratts*, Building Comm., in behalf of the Trustees of the *New Washington Seminary*."

The writ was returned "not found" as to *Ratts*. The other defendants pleaded *nil debent*. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

On the trial, the plaintiff offered in evidence an instrument

(a) *Mansur v. Bradley*, 22 Ind., 476; 21 Id., 205; 2 Id., 327.

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in writing corresponding with that described in the second count. The evidence was objected to, but was admitted. The defendants introduced the act incorporating the trustees of said seminary, and some other testimony. There [*42] was no* evidence before the jury in support of the action, except the instrument of writing to which we have referred.

Assuming that the instrument in question, if legally executed, may be the foundation of a suit, of which, however, we give no opinion, we consider that it only purports to be the acknowledgment of the trustees of the *New Washington* seminary. The reason of this opinion is, that the instrument is executed by the defendants in behalf of those trustees, and states that it was given for work done on said seminary. The following authority supports this view of the case: Assumpsit against *James S. Colburn* on the following note: “\$301. *Boston*, 17th *March*, 1812. For value received, I promise to pay *Mr. Edward J. Long* or order, on demand, three hundred and one dollars, with interest after four months. *Pro William Gill*. —*J. S. Colborn*.” Plea, the general issue. The Court said, that it appeared on the face of the note itself, that the defendant was not to be considered as the promiser; that he had signed his own name *pro William Gill*; and that the plaintiff’s remedy was against *Gill*, if *Colburn* had authority to make the promise for him; and if he had not, a special action on the case would lie against *Colburn*. The plaintiff was accordingly nonsuited. *Long v. Colburn*, 11 *Mass.*, 96.

No suit on the instrument before us can be sustained against the defendants, because it does not contain any acknowledgment by them individually. If they were authorized by the trustees to execute it, the suit should be against the trustees. If they were not so authorized, they are liable in case for acting in the matter without authority. *Ballou v. Talbot*, 16 *Mass.*, 461.

The instrument, according to the view we have taken of it, does not support the first count; and the second count, which sets it out *in hæc verba*, contains no cause of action against the defendants.

Limpus v. The State, on the Relation of Helm and Another.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. G. Marshall, for the plaintiffs.

G. H. Dunn, for the defendant.

[*43] *LIMPUS v. THE STATE, on the Relation of HELM and Another

WITNESS.—In debt against a constable on his official bond for a false return of a *feri facias*, the execution-defendant can not be objected to as a witness for the plaintiff on the ground of his being interested.

SAME.—*A* executed a bond for the delivery of goods taken on an execution against *B*, which goods were afterwards, on *A*'s claim, adjudged to be his, and were therefore not delivered according to the condition of the bond. *Held*, that in a suit by *C* against the officer for a false return of the execution, *A*'s execution of the delivery-bond, (he having been discharged from it by said adjudication), did not render him incompetent as a witness for either party.

RIGHT OF PROPERTY.—If the goods on which an execution is levied be taken from the officer by a judgment in favour of the claimant, on a trial of the right of property, the judgment is conclusive, as to the right of that property, in a suit against the officer for a false return of the execution.

FAILURE TO LEVY—DAMAGES.—If a constable fail to levy an execution on goods which might have been levied on, the value of the goods with interest and ten *per cent.*, is, in a suit for such failure, the measure of the plaintiff's damages.

ERROR to the Fayette Circuit Court.

BLACKFORD, J.—This was an action of debt, commenced before a justice of the peace, against a constable on his official bond. There are several breaches assigned, consisting of various false returns alleged to have been made by the defendant to certain writs of *feri facias*. The justice gave judgment for the plaintiff, and the defendant appealed to the Circuit Court. Verdict in the Circuit Court for the plaintiff, and judgment accordingly.

On the trial, the plaintiff offered as a witness the execution-defendant, to prove that the returns to the executions were

Limpus v. The State, on the Relation of Helm and Another.

false. The witness was objected to as interested, but the objection was overruled.

The plaintiff also offered another witness, who was objected to as being interested. In support of the objection, it was proved that the witness had executed a bond conditioned for the delivery of property stated in one of the breaches to have been levied on; that after the execution of such bond, the witness claimed the property, and it was adjudged to be his; and that the property was not delivered. The objection was overruled.

The objections to the witnesses offered were properly overruled. The first witness offered—the execution-defendant—would be equally liable to the plaintiff, whether this [*44] *suit failed or not. *Bonajous v. Walker*, 2 T. R., 126; *Taylor v. The Commonwealth*, 3 Bibb, 356. He was not, therefore, interested in sustaining the action. The second witness was discharged from the delivery-bond by the determination, in his favour, of the trial of the right of property. His having executed the bond, therefore, could be no objection to his competency as a witness for either party.

In consequence of certain instructions given to the jury, and of the refusal of others, the following questions are presented for decision. First, if property levied on by the defendant, was taken from him by a judgment in favour of the claimant, on a trial of the right of property, was such judgment conclusive, in the present suit, as to the right of that property? Secondly, What was the measure of the plaintiff's damages, for the defendant's failure to levy on certain property of the execution-defendant's, which might have been levied on?

The first of these questions must be decided in the affirmative. The statute is express, that the judgment in the case of such trial of the right of property is conclusive, whilst unreversed, as to any party who had had personal notice of the trial; and as the statute requires in such case, that the execution-plaintiff and the officer (the present parties) should have notice of the suit, it must be presumed that they had such notice. R. S., 1838, p. 492.

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The second of these questions is as easily answered as the first. The statute enacts, that in case of a false return to a *fieri facias*, the constable and his sureties shall be liable on their bond for the full amount which the constable might have collected and paid over, with interest and ten *per cent.* damages. R. S., 1838, p. 148. The value of the property, therefore, which might have been levied on by the constable, together with interest and ten *per cent.*, was the measure of damages for the failure to make the levy.

This opinion on these two questions agrees with that of the Circuit Court, except that the Circuit Court limited the measure of damages, referred to in the second question, to the value of the property which might have been levied on—saying nothing as to the interest and ten *per cent.* damages. But that mistake of the Circuit Court did not injure the defendant.

[*45] **Per Curiam.*—The judgment is affirmed with five *per cent.* damages and costs.

C. B. Smith, for the plaintiff.

S. W. Parker, for the defendant.

THE STATE v. BREWER.

PROSECUTING ATTORNEY—REMITTITUR.—Indictment for malicious trespass. Verdict as follows: "We the jury find the defendant guilty in manner and form as charged in the indictment, and assess his fine at \$12.00 and two days' imprisonment in the county jail." The prosecuting attorney remitted the imprisonment except six hours, and judgment was rendered against the defendant for \$12.00, and that he be imprisoned six hours, and pay the costs. *Held*, that the prosecuting attorney had no authority to enter the *remititur*. *Held*, also, that the judgment though erroneous for not agreeing with the verdict, could not be reversed on a writ of error brought by the State.

ERROR to the Wells Circuit Court.

BLACKFORD, J.—Indictment for malicious trespass. Plea, not guilty. Verdict as follows: "We the jury find the defend-

Chapman v. Ellison, in Error.

ant guilty in manner and form as charged in the indictment, and assess his fine at \$12.00 and two days' imprisonment in the county jail." Motions for a new trial and in arrest of judgment were made by the defendant and overruled. The following entry appears afterwards of record: And the said prosecuting attorney here remits all the imprisonment in this behalf except six hours. It is therefore considered by the Court, that the said State of *Indiana* do have and recover against the said defendant the said sum of \$12.00, and be imprisoned for the space of six hours, that he pay costs," &c.

The prosecuting attorney had no authority to enter any remission in this case, and the judgment not agreeing with the verdict is no doubt erroneous. But still the judgment can not be reversed on a writ of error brought by the State. The defendant has been tried upon a good indictment, and a verdict and judgment have been rendered against him. If the judgment could be reversed at the instance of the State, the defendant would be in danger of having another judgment in

the cause rendered against him, and be thus put in [*46] *jeopardy a second time for the same offense. The constitution forbids such a proceeding. Ind. Const.,

Art. 1, sect. 13.

Per Curiam.—The judgment is affirmed.

W. H. Coombs, for the State.

T. Johnson, for the defendant.

CHAPMAN v. ELLISON, in Error.

IN a suit on a promissory note, the declaration professing to set out only the legal effect of the note, omitted the words "For value received" which the note contained. *Held*, that the variance was immaterial. *Crenshaw et al. v. Bullitt et al.*, 1 Blackf., 41, and note.

Williams v. Lines.

WARD v. HAZLERIGG, in Error.

THE certificate of a justice of the peace to a transcript of his judgment in a cause, filed in the clerk's office in the case of an appeal, was as follows: "State of *Indiana*, *Fountain* county, ss., I, *H. S. Scott*, a justice of the peace in and for said county, certify that the above is a full and true transcript of the above case from my docket. Given under my hand and seal this 15th day of *April*, 1842. *H. S. Scott*, J. P. [SEAL.]" *Held*, that the certificate was sufficient. *Wiley v. Forsee*, 6 Blackf., 246.

WILLIAMS v. LINES.

JUDICIAL SALE—FAILURE TO PAY PURCHASE-MONEY.—A purchaser of land on execution having failed to pay the purchase-money, the sheriff afterwards sold the land to another person for a less price than it first sold for. *Held*, that, in the statutory proceeding by notice and motion against the first purchaser for the difference in the amount between the first and second sales, the notice must aver an offer by the sheriff to convey the land to the defendant before the second sale. (a)

[*47] *ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—This was a proceeding by *Lines*, sheriff of the county of *Fayette*, against *Williams*, to recover from the latter the sum of \$850 and costs, under the provisions of an act to amend the act subjecting real and personal estate to execution. R. S., 1838, p. 286.

The act referred to, after declaring that any person who shall purchase any real or personal property sold on execution, and shall neglect or refuse to pay the purchase-money, shall be liable, on motion by the sheriff, to a judgment for the amount so bid, &c., provides, "that nothing in said act contained, shall prevent the officer making such sale from re-exposing the same

(a) *State v. Lines*, 4 Ind., 351.

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property to sale on the same or a subsequent day; and if the amount of such second sale shall not be equal to the amount of the first sale and the costs of the second sale, the first purchaser shall be required to pay the deficiency, and be liable to a motion and judgment therefor in manner aforesaid."

The notice in this case recites, that a judgment had been rendered by the *Fayette* Circuit Court in favour of one *Harwood* against *Chapman* and another; that an execution was issued on said judgment and certain lands levied on; that they were exposed to sale according to law, and *John Williams*, the defendant, bid therefor the sum of \$1,250; and that being the highest price bid for them they were knocked off to him; that *Williams* refused to pay the money; whereupon an *alias venditioni exponas* was issued directed as before, and the same lands, on being again exposed to sale, were sold to *M. M. Ray* at and for the sum of \$400, &c.; by reason whereof the said *Lines*, sheriff, &c., would move the Court to enter judgment against said *Williams* for the sum of \$850, that being the amount of the difference between the sum bid by him, &c., and the sum for which the lands were afterwards sold to *Ray*, together with the costs, &c. The defendant pleaded twelve pleas. On the first five issues were formed, which were decided in favour of the plaintiff. To the remaining pleas the plaintiff demurred, and the demurrers were sustained by the Court. Final judgment was thereupon rendered against the plaintiff in error for the sum of \$850 damages and costs.

[*48] *The notice in this case is in the nature of a declaration, and the demurrers to the pleas extend to it. It is therefore necessary to examine it, and see whether the facts stated in it are sufficient to give the plaintiff a right to maintain this suit.

It is contended for the plaintiff in error that the notice is not sufficient, because it does not aver an offer by the sheriff to convey the lands to *Williams* before they were sold to *Ray*. We concur in opinion with the counsel for the plaintiff, that the omission of that averment is a fatal defect in the notice. A purchaser at such a sale is not bound to part with his money

Hatch v. Dickinson.

until he receive a deed. The payment of the money and the execution of the deed are concurrent acts, and neither can proceed against the other without performance or an offer to perform on his part. The purchaser can not be said to neglect or refuse to pay the purchase-money, if the sheriff be not prepared and willing to comply on his part, and do not, within reasonable time, offer to do so.

Other errors are assigned, but it is not necessary to examine them. The defect in the notice is fatal to the plaintiff's right to recover.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker and *J. S. Newman*, for the plaintiff.

C. B. Smith, for the defendant.

HATCH v. DICKINSON.

MUTILATED NOTE.—If a person sue as payee on a promissory note so mutilated that the payee's name is illegible, he must prove that the note was made to him, that he had possession of it when he commenced the suit, and that it was mutilated under circumstances not affecting its validity.^(a)

ERROR to the *Elkhart* Circuit Court.

SULLIVAN, J.—Assumpsit by *Dickinson* against *Hatch*. The declaration contains two counts. The first is on an instrument in writing, whereby *Hatch* promised to pay to *Dickinson* \$200 "in property." The second is on a promissory note [*49] for \$200. Plea, the general issue. *The cause was tried by the Court, and judgment given for the plaintiff below.

The first objection urged against the proceedings is, that the Court gave judgment on the first count, without evidence of the value of the property. The value of the property to be delivered was agreed on by the parties. The instrument de-

(a) *Johnson v. The Wabash, &c., Co.*, 16 Ind., 389.

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clared on fixed the value at \$200, and there was no need of further evidence to enable the Court to assess the damages on that count.

The second objection is, that the note offered in evidence under the second count did not support the allegations in that count. It appears from the bill of exceptions, that the note was mutilated so that a part only of the last syllable of the surname of the payee (*Dickinson*), together with his Christian name was legible; and the plaintiff below offered no additional evidence to prove that the contract was made with him as alleged in the declaration. This objection we think is well taken. The note should have been accompanied with evidence showing that it was made payable and delivered to the payee, that he had possession of it when he commenced the suit, and that it was mutilated under circumstances not affecting its validity. Without such proof, the evidence was not sufficient to support the plaintiff's action. The rule of evidence in such cases was laid down in the case of *Justus v Cooper*, decided at the present term.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Bradley, for the plaintiff.

J. W. Chapman, for the defendant.

THE STATE v. JOHNSON.

PERJURY.—It is perjury to swear falsely to a material point in an affidavit for the continuance of a cause.

SAME—INDICTMENT.—If an indictment for perjury show that the false matter sworn to was material to the question before the Court, an express allegation of its materiality is unnecessary. (a)

[*50] *ERROR to the Warren Circuit Court.

SULLIVAN, J.—The defendant was indicted for

(a) *The State v. Flagg*, 25 Ind., 243.

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perjury. The indictment charges that, on, &c., a certain suit was pending in the Warren Circuit Court between *John Kent*, plaintiff, and the defendant, *Henry Johnson*, and one *Thomas Johnson*, founded on a promissory note; that for the purpose of obtaining a continuance of the cause from the *March* term, 1841, until the term next following, the defendant did then and there falsely, willfully and corruptly swear and make affidavit, &c., that one *Joseph Kent* was a material witness for the defendants in said cause; that the affiant had used due diligence to procure the testimony of said *Kent*, &c.; that he expected to be able to prove by *Kent* the payment of \$60 on the note sued on, and that said affidavit was not made for delay, &c. The indictment then assigns the perjury, which consists in an express contradiction of the defendant's statements above set forth. The Court, on motion of the defendant, quashed the indictment.

The affidavit contained several distinct allegations, all of which were necessary to make it sufficient. If either of them was false, the affiant was guilty of perjury. The statute declares that any person, who shall take a lawful oath in any matter in which by law an oath may be required, and shall under such oath swear willfully, corruptly and falsely, touching a matter material to the point in question, shall be deemed guilty of perjury. R. S., 1838, p. 211, sect. 22, 23. It is perjury to swear falsely in an affidavit to hold to bail, Peake's N. P., 112, or in an answer to a bill in chancery, 5 Mod., 358, or in taking the oath as a voter at an election, 6 East, 323; 2 Camp., 134, as well as to swear falsely to a point material to the issue as a witness upon the trial of a cause. So, it is perjury to swear falsely to a material point in an affidavit for the continuance of a cause.

It is not necessary, as is contended, that the indictment should contain an express allegation that the matter sworn to was material to the question before the Court. Where its materiality evidently appears from the statement of the matter itself, the express allegation may be omitted. *State v. Hall*, at the present term.

Middlewood v. Nevitt.

The indictment in this case is sufficient, and the Court erred in quashing it.

[*51] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Willson, for the State.

R. C. Gregory, for the defendant.

MIDDLEWOOD v. NEVITT.

RETURN OF EXECUTION.—A constable having in his hands a *fi. fa.*, issued under the statute of 1842, may, on finding no goods on which to levy, return the execution before the return-day.

ERROR to the *Dearborn* Circuit Court.

SULLIVAN, J.—*Scire facias* by the plaintiff against the defendant as replevin-bail for one *Belding*. The suit was commenced before a justice of the peace. The cause was appealed to the Circuit Court, and on motion of the defendant the Circuit Court dismissed the suit. It appears that the execution, on the original judgment in favour of the plaintiff against *Belding*, was returned in less than 120 days from its date, and a bill of exceptions informs us that the cause was dismissed for that reason.

These proceedings were had under the act of 1842, the 4th section of which provides that “all executions, issued by a justice of the peace, shall be made returnable at the expiration of 120 days and not sooner, so that not more than three executions shall be issued by a justice of the peace in any case in a period of twelve months.” Acts of 1842, p. 65. Previously to the enactment of that statute the law was, that executions issued from a justice’s Court should be made returnable in thirty days. Under that law we decided, in a case somewhat analogous to the present, that a constable was not bound to take all the time allowed by law before he returned an execution *nulla bona*; but that having made a full examination for goods with-

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out success, he was at liberty to return it. *Wilcox v. Ratliff*, 5 Blackf., 561. The act of 1842 is not inconsistent with that decision. It is imperative as to the number of executions to be issued within twelve months, and that an execution shall not be made returnable sooner than four months from its [*52] date, thereby intending to *prevent defendants from being unnecessarily harassed; but it does not compel the constable to hold the writ in his hands until the return-day, if there be no goods of the execution-defendant on which to levy it.

We think the officer was at liberty to make the return when he did, and that the return laid the foundation for a suit against the bail, which the plaintiff might prosecute immediately.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Dumont, for the plaintiff.

J. Ryman and *P. L. Spooner*, for the defendant.

GULLETT and Others v. HOUSH.

BILL OF REVIEW.—A bill of review containing no equity on its face, must, on final hearing, be dismissed.

SAME.—A bill of review can be brought only in two cases; one, for error in the record, the other, on account of new matter discovered since the decree; or, at least, since the publication of the testimony.

SAME.—A defendant to a bill in equity, having negligently suffered a decree to go against him by default, can not allege his own negligence in support of a bill of review.

SAME.—If a defendant in equity knew of certain facts necessary to his defense before the rendition of a decree against him, he can not support a bill of review by alleging that he has, since the decree, discovered certain evidence of those facts, without showing that he could not prove them by other testimony.

SAME—LIMITATIONS.—The statute of limitations may be relied on in bar of a bill of review.

ERROR to the *Jackson* Probate Court.

Gullett and Others v. Housh.

DEWEY, J.—This was a bill of review brought, on leave, by *Housh* against *Gullett's* heirs, in the Probate Court of *Jackson* county, at the *August* term, 1839. The bill sets forth that *Gullett's* heirs, by *Judy*, their guardian, in *January*, 1831, filed their bill (reciting it) in that Court against *Housh* as the administrator of their father's estate, the object of which was to recover their distributive shares thereof. The bill of review also states, that the parties to the original bill appeared in Court from term to term until that of *March*, 1832, when the [53] defendant had leave to file his answer ten *days before the next ensuing term of *August*, at which term the parties again appeared and the cause was continued. At the *November* term, *Housh* having failed to put in his answer previously thereto, the Court decreed that he should pay to *Gullett's* heirs \$165.45, and costs. The reasons assigned for a review and reversal of the decree are, 1, That *Housh* was not in Court when the order for his answer was made, that he did not rightly understand it, but supposed it extended to the *August* term, which was the reason why he did not put in his answer in season; 2, That previously to the decree he had made several payments in the due course of administration; and, particularly, that he had paid to *Judy*, the guardian of *Gullett's* heirs, \$50.00, and had taken his receipt therefor, which was lost; that he had received no credit for that sum; and that, after the decree, *Judy* had acknowledged the payment, which acknowledgment he could prove; and, also, that one *Carter* owed *Gullett's* estate \$79.00, which, by the direction of *Housh*, he had, before the decree, paid to *Judy* as guardian; that since the decree, he had ascertained this payment could be proved by a certain witness, and by the subsequent admission of *Judy*; and that no credit had been allowed therefor. The prayer of the bill was for a temporary stay of proceedings upon the original decree, and for a review and reversal of it. The stay was granted. *Gullett's* heirs by their guardian, *Judy*, put in their answer to the bill of review, in which they claimed the benefit of the statute of limitations; *Housh* replied; and the Court, on final hearing, decreed a perpetual injunction

against the original decree, and that *Judy* should pay to *Housh* a certain sum.

This decree can not be sustained. The bill of review shows on its face no equity; and this is a good cause for dismissing it, which may be urged on final hearing.

Bills of review can be sustained only in two cases. One is where there is error of law apparent upon the face of the record; and the other, where new matter has been discovered since the decree, or, at least, after the publication of the testimony. Story's Eq. Pl., pp. 322, 328.

The bill before us does not present either of these cases.

The first cause assigned for a review and reversal [*54] of the *decree, namely, that *Housh* did not put in his answer to the original bill in proper time, because he misapprehended the terms of the order of the Court requiring him to answer in a given period, is no more than an allegation of his own negligence, and does not entitle him to relief in any form. Even had the order been as he states he supposed it to be, that he should answer at *August* term, instead of ten days before it, he would still have been in fault, for he made no attempt to answer at that term.

The other cause on which he rests his claim to a review and reversal of the decree, is not, in truth, an allegation of the discovery of new and material facts after its rendition. It shows that the payments, the benefit of which he claims, were made by himself and by his direction before the decree. He must, of course, have been aware of their existence, and might have urged them had he made defense against the original bill. The bill of review does, indeed, state that *Housh* ascertained, after the decree, that he could prove one of the payments by a certain witness, and two of them by the subsequent admissions of the guardian of the original complainants. But to bring himself, on account of these matters, (allowing such admissions to be competent evidence, with regard to which we express no opinion), within the principle of relief on the ground of newly discovered facts, he should have shown that he could not have proved the payments by any other testimony. This would

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have been the case had he been guilty of no laches in the original suit. Having negligently failed to defend himself in that suit, there is no pretense for claiming relief by a bill of review on account of the discovery of the testimony above stated.

There may be error apparent in the original record, but none is specified, as it should be, if relied on in a bill of review. But had such error been assigned, it could not have availed the complainant in review. His bill was filed more than five years after the rendition of the decree sought to be reversed, and the defendants have claimed the benefit of the statute of limitations. That statute is a bar to a bill of review. *Jenkins v. Prewitt et al.*, 5 Blackf., 7.

[*55] **Per Curiam*.—The decree is reversed with costs
Cause remanded, &c.

A. C. Griffith, for the plaintiffs.

H. P. Thornton, for the defendant.

BUELL v. TATE.

RESCISSION OF CONTRACT.—One party to an executed contract can not rescind it, without restoring the other party to his original situation.(a)

VENDOR AND PURCHASER—MORTGAGE.—The purchaser of real estate incumbered by a mortgage, can not, because of the mortgage, defend an action for the purchase-money, without having first extinguished the incumbrance to the amount of the debt sued for.(b)

SAME—INJUNCTION.—But if the incumbrance exceed the debt, the purchaser may, in a Court of chancery, have the collection of the debt enjoined, until the incumbrance be reduced to an amount not exceeding the debt.(c)

ERROR to the *Dearborn* Circuit Court.

DEWEY, J.—Debt by the assignee against the maker of a promissory note for \$160. The defendant pleaded, that the

(a) *Gatling v. Newall*, 9 Ind., 572.

(b) *Holman v. Creagmiles*, 14 Ind., 177.

(c) *Arnold v. Curl*, 18 Ind., 339.

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note was given for a part of the price of a lot of ground purchased by him of the payee of the note, and by the latter conveyed to him by a general warranty deed; that the vendor falsely, with intent to defraud the defendant, represented that the land was free from incumbrance, and thus induced him to purchase the same, and give the note; that, in fact, the land was subject to a mortgage previously executed by the vendor for \$10,532, which was in full force at the time of making the contract, and when the plea was filed; and that the defendant was ignorant of the incumbrance, and would not have made the contract had he known it. The plaintiff demurred generally to the plea. The Court sustained the demurrer. There was another special plea which led to an issue of fact. Trial by the Court, and judgment for the plaintiff for the amount of the note.

The only question in the cause arises from the demurrer. The fraud alleged in the plea undoubtedly entitled the defendant to rescind the contract of sale, and to consider the note as a nullity, had he seen fit to do so in proper season; but he could not rescind the contract without restoring the vendor to his original situation by reconveying the land. As he has [*56] *not pursued that course, it becomes necessary to inquire whether the plea shows a want or failure of the consideration of the note. Had the vendor possessed no title whatever to the land, his conveyance would not have constituted a good consideration for the promise of the defendant to pay him the price; and his want of title might have been pleaded in bar of this action. *James v. Lawr. Ins. Co.*, decided at this term. But as the case presents itself, the defendant can not say he took nothing by the conveyance. He acquired an estate incumbered by a mortgage. This incumbrance, however, may never injure him; it may be cleared off by the mortgagor. And as the plea does not state what was the price stipulated by the defendant to be paid for the land, or whether any part of it has been paid by him, he may still hold enough of the purchase-money, independent of this note, to indemnify himself against the mortgage. Before he can set up

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the incumbrance as a defense against this action, he must show that he has extinguished it to the amount, at least, of the note, or has been otherwise injured by it to that extent. This principle was established in *Whisler v. Hicks*, 5 Blackf., 100, and *Smith v. Ackerman*, Id., 541. We think the plea is bad, and that the demurrer was correctly sustained.

But though the defendant can not defend this action by simply showing the existence of the incumbrance, yet if it exceed in amount the stipulated price of the land, or that part of it still due from the defendant, he may resort to a Court of equity for relief, and procure an injunction against the collection of the debt, until the mortgagor shall reduce the incumbrance to an amount not exceeding that of the purchase-money due.

Per Curiam.—The judgment is affirmed with costs.

A. Lane, for the plaintiff.

J. Ryman and *P. L. Spooner*, for the defendant.

GREENHOW v. BOYLE.

BILL OF EXCHANGE.—FILLING BLANKS.—A paper purporting to be a bill of exchange, having a blank for the payee's name, may be filled up at any time by a *bona fide* holder; but until it is so filled up, a suit will not lie on it against the acceptor.

[57] SAME.—EVIDENCE.—In an action for money had and received, &c., by the drawer against the acceptor of such blank bill, the bill is not sufficient evidence to support the suit.

APPEAL from the Knox Circuit Court.

SULLIVAN, J.—This was an action of assumpsit, by the appellee against the appellant, on an instrument of writing, purporting to be a bill of exchange, by which *Boyle*, the drawer, requested *Greenhow*, the acceptor, to pay to ——— or order \$1,000. The declaration contains four special counts. The first and second are upon bills drawn by the appellee on the appellant payable to *S. N. and E. P. Bowman* or order, and accepted by the appellant. The third is on a bill payable to the order of the drawer, also accepted by the appellant. The

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fourth is on a bill payable to blank and accepted by the appellant. There are also counts for money had and received, money lent and advanced, &c. Plea, non assumpsit. Verdict and judgment for the appellee.

It is admitted by the counsel that, on the trial of the cause, the only evidence offered was an instrument of writing drawn by *Boyle*, and addressed to *Greenhow*, by which the latter was directed to pay to ——— or order \$1,000; that it was accepted by the drawee payable at a bank in *Louisville*, and that it was indorsed *S. N. and E. P. Bowman*, and *Robert Mosely*. The appellant objected to the evidence, but the Court overruled the objection.

The only doubt about this case is, whether the paper offered and received in evidence, was admissible under the common counts.

In the imperfect state in which it was when offered, it did not support either of the special counts. If a bill of exchange, or what purports to be a bill of exchange, be issued with a blank for the payee's name, any *bona fide* holder may insert his name, either before or after acceptance, but until the blank be filled up, it is not a bill. *Crutchley v. Clarence*, 2 M. & S., 90; *Crutchly v. Mann*, 5 Taunt., 529; *Atwood v. Griffin*, 2 Carr. & P., 368; *Gibson et al. v. Minet et. al.*, 1 H. Bl., 569; *Rex v. Randall*, Russ. & Ry. Cr. Cas., 195; Id., 193. We think it follows, that it was not sufficient evidence to support the common counts. If the paper was no bill, it can not be made to have the effect of one, so long as it

[*58] *remains incomplete. Generally, an acceptance of a bill of exchange, complete, and having the proper parties, is evidence of money had and received by the acceptor to the use of the drawer. But we can find no case in which the principle has been applied to the acceptance of a blank bill.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the appellant.

J. Whitcomb, for the appellee.

 Alcorn v. Hooker.

ALCORN v. HOOKER.

SLANDER.—Slander for calling the plaintiff a whore. The words were laid to have been spoken in 1842. Plea, that the plaintiff while sole and unmarried, on the 1st of *January*, 1834, had carnal connection with one *H.* Replication, that the plaintiff, before, and at the time mentioned in the plea, was betrothed to the said *H.*; that afterwards, on the 6th of *June*, 1834, she was lawfully married to him; that she lived with him a virtuous life until the 1st of *August*, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. *Held*, on general demurrer, that the replication was insufficient.(a)

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—This was an action of slander for calling the plaintiff below a w—e. The words are alleged to have been spoken in 1842. Pleas, general issue, and a justification. The latter alleges that the plaintiff, while sole and unmarried, on the 1st of *January*, 1834, had carnal connection with one *William Hooker*. Replication, that the plaintiff, before, and at the time mentioned in the plea, was betrothed in marriage to the said *Hooker*; that afterwards, on the 6th of *June*, 1834, she was lawfully married to him; that she lived with him a virtuous life until the 1st of *August*, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. General demurrer to the replication overruled. Jury trial on the general issue. Verdict and judgment for the plaintiff.

The only question in this cause is as to the sufficiency of the replication.

The statute, which makes it actionable to impute [*59] to a *female a want of chastity, subjects the charge to the same rules and regulations which govern an accusation subjecting the accused to criminal punishment. *R. S.*, 1838, p. 452. Had the charge been that the plaintiff was a thief, and the defendant had justified by alleging a specific larceny committed many years before speaking the words, there

(a) *Rodebaugh v. Hollingsworth*, 6 Ind., 339.

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can be no doubt it would not do to reply, that the theft was committed under circumstances of great temptation; that the stolen goods had been returned; and that the plaintiff had lived an honest life ever since. We can see no distinction in principle between such a case, and that presented by the record; nor do we believe the cause of public morals would be subserved by introducing a distinction. There is no greater hardship in the one instance than in the other. In both, malice may occasionally disturb the peace of a reformed and virtuous life by adverting to the past. But this is a penalty which vice, though abandoned and repented of, must pay. The replication is no answer to the plea; it neither denies, nor confesses and avoids it. We think the Circuit Court erred in overruling the demurrer.

SULLIVAN, J., dissented.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal and *W. Quarles*, for the appellant.

W. W. Wick and *L. Barbour*, for the appellee.

 FELLOWS and Another v. KRESS.

SET-OFF. —Assumpsit. The issues were whether a note, pleaded as a set-off, had been discharged by an accord and satisfaction, or in any other manner. The Court instructed the jury that if the note was, for value, surrendered to the plaintiff with a promise by him to account for the proceeds of it, the promise to account was the only proper subject of set-off in the cause *Held*, that the instruction was erroneous.

ERROR to the *Lawrence* Circuit Court.

DEWEY, J.—Assumpsit by *Kress* against *W. and C. Fellows*. Verdict and judgment for the plaintiff.

One of the pleas filed by the defendants was a statutory [*60] plea of payment, containing several matters of set-off; one of the items of set-off was a promissory note made by the plaintiff to the defendants for \$8,618.89.

Fellows and Another v. Kress.

The plaintiff replied to this item, alleging an accord and satisfaction of the note by the sale and delivery, by the plaintiff to the defendants, of certain boat-loads of pork and bacon, &c. The defendants rejoined denying the accord and satisfaction; upon which there was issue. The plaintiff also replied to the whole matter of set-off non assumpsit, upon which there was issue.

The Court instructed the jury, "If the note for \$8,618.89 was, for a valuable consideration, surrendered up to Kress, with a promise from him that he would account for the proceeds of it, the promise to account was the only proper subject of set-off in this cause." The defendants excepted.

We think this instruction can not be sustained. The issues were whether the note had been discharged by accord and satisfaction, or in any other manner. If the proof sustained either of the issues on the part of the plaintiff, the note was not a valid set-off, otherwise it was. This was a matter for the consideration of the jury under all the circumstances of the case. But they were told by the Court, that if the note was surrendered to the plaintiff for a valuable consideration, he promising to account for it, the note was not an available set-off. This was saying, that transactions between the parties, which the jury might, or might not, consider as establishing an accord and satisfaction or other discharge of the note, would defeat the set-off. If, indeed, the note had been satisfied, paid, or discharged, and a new, distinct, and valid promise was made by the plaintiff, such promise, and not the note, should have been pleaded as a set-off. But whether the surrender of the note and the other circumstances attending it were a satisfaction, payment, or discharge, should have been left to the jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

*R. Crawford, J. W. Payne and G. G. Dunn, for the plaintiffs.
J. G. Marshall and R. W. Thompson, for the defendant.*

Harper and Others v. The State, on Relation of Board, &c., of Knox county.

[*61] *HARPER and Others v. THE STATE, on the Relation of the Board of Commissioners of Knox county.

ALTERATION OF BOND.—If after the execution of a bond by several persons, it be altered by inserting in the body of it the names of others as co-obligors, and by adding their signatures to it, and the circumstances under which the alteration was made be not explained by the obligee, the bond will be considered void as to the first obligors.^(a)

SAME.—A suit on the bond against all the obligors can not, in such case be sustained.

ERROR to the Knox Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State, on the relation of the board of commissioners of *Knox* county, against *Jacob Harper, Martin Robinson, John Collins, Isaac Coons, Jonathan P. Cox, George Calhoun, and John Weaver*. The suit is founded on a joint and several bond, executed by the defendants and one *John K. Kurtz*, whom the defendants had survived, in the penalty of \$4,000, conditioned for the faithful discharge, by *Harper*, of certain duties, &c. Two of the defendants, *Robinson* and *Collins*, pleaded *non est factum*, upon which issue was joined. There were issues on other pleas which it is not necessary to notice. One of the pleas was demurred to and the demurrer correctly sustained. The cause was submitted to the Court, and judgment rendered for the plaintiff.

On the trial, the plaintiff offered in evidence the bond declared on, and introduced a subscribing witness who stated that, on, &c., the bond was executed by *Harper, Kurtz, Robinson, and Collins*; that two years after such execution of the bond, the same was altered by inserting the names of the other defendants as co-obligors in the bond, and by adding their signatures to it; and that he, the witness, was not aware that *Robinson* and *Collins* assented to the alteration. The defendants, thereupon, objected to the bond as evidence, but the objection was overruled.

(a) See *State v. Pepper*, 31 Ind., 76; *Id.*, 128; 27 *Id.*, 41; 20 *Id.*, 139.

 Strong and Others v. Bragg and Another.

We think the bond, according to the facts proved, could not be considered valid as to the defendants who pleaded *non est factum*. It appears that two years after the defendants who so pleaded had executed the bond, it was altered in a material part by its being executed by several other persons, and [*62] by the insertion of their names in the body of it; *and there was no evidence that the alteration was made with the consent of the two defendants who had previously executed it, and who pleaded *non est factum*. In the absence of all explanatory evidence, the alteration, made after the said two defendants had executed the bond, must be presumed to have been made with the assent of the relator, and without the assent of those two obligors. The consequence is, that the bond was void as to two of the obligors, and that the suit against them and the other defendants, founded on the bond, ought not to have been sustained.

Per Curiam.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

J. Law, for the plaintiffs.

S. Judah, for the defendant.

 STRONG and Others v. BRAGG and Another.

DOWER—MORTGAGE.—A widow can not mortgage her dower until it be assigned to her.(a)

ERROR to the *Union Circuit Court*.

BLACKFORD, J.—Bill in chancery, filed by *Bragg* and another, to foreclose the equity of redemption in a mortgage of a right of dower; the dower not appearing to have been assigned. Decree for the complainants.

This decree must be reversed for want of equity in the bill. Before assignment, a title to dower is only a right of action, and transferable only by release to the terre-tenant by way of

(a) Overruled by *Strong v. Clem*, 12 Ind., 37.

Wright and Others v. The State, on the Relation of Woolman, &c.

extinguishment. Park on Dower, 335. The widow has no estate in the land until her dower is assigned, for the law casts the freehold on the heir immediately upon the death of the ancestor. 1 Cruise, 158. She can not enter for her dower until it be assigned her, nor can she alien it so as to enable the grantee to sue for it in his own name. 4 Kent's Comm., 61. It seems necessarily to follow from the doctrine above stated, that a widow can not, before assignment, mortgage her right of dower.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

C. H. Test, for the plaintiffs.

C. B. Smith, for the defendants.

[*63] *WRIGHT and Others v. THE STATE, on the Relation of WOOLMAN, &c.

SCHOOL COMMISSIONER—PLEADING.—The declaration, in a suit by the State on the relation of a school commissioner, alleged, under a *videlicet*, that the relator was appointed such commissioner on a certain day. Plea, that the relator was not appointed on that day. *Held*, that the plea was bad, as tendering an immaterial issue.

SAME—BOND.—A school commissioner may be the relator in an action, founded on the bond of his predecessor, for the non-payment by the latter to his successor of the school funds in his hands at the expiration of his office.

SAME—DEMAND.—The declaration in such suit need not aver a special demand on the ex-commissioner to pay over the funds to his successor

ERROR to the Grant Circuit Court.

DEWEY, J.—This was an action of debt, in the name of the State on the relation of *Woolman*, school commissioner of *Grant* county, against *Wright*, a former commissioner, and his sureties, on his official bond. The condition of the bond is, that *Wright* should faithfully discharge the duties of his office, and should,

Wright and Others v. The State, on the Relation of Woolman, &c.

at the expiration of his term of service, pay over to his successor all moneys which might then be in his hands for the use of town schools. The declaration assigns two breaches of the condition of the bond. The first alleges that, while *Wright* was in office, he received \$10,000 belonging to the relator for the use of town schools in *Grant* county; that after he received the money, "to wit, on the second day of *September*, 1839," the relator was duly appointed school commissioner and successor of *Wright*, and continued in office until the commencement of the suit; and that *Wright* had never in any way accounted for the school funds which he had received, and did not at the expiration of his term of service, or at any other time, pay over the funds to the relator as his successor, although often requested so to do, but wholly failed. The second breach is like the first, except that it alleges the money in *Wright's* hands to belong to the "school congressional townships of *Grant* county." The defendants pleaded nine pleas. The first, third, fifth, sixth, and eighth pleas led to issues of fact. To the second, fourth, seventh, and ninth pleas, the plaintiff demurred, and the demurrers were sustained. Trial by the Court; finding and judgment for the plaintiff.

[*64] *The plaintiffs in error do not attempt to sustain the fourth and ninth pleas, but they contend that the second and seventh are good. The second plea is to the whole declaration, and alleges "that the said relator was not, on the second day of *September*, 1839, duly and lawfully elected and qualified school commissioner of the said county of *Grant*, and successor to the said *Wright*, in manner and form," &c. The seventh plea is the same, except that it is to the second breach only.

The substantial allegations in the declaration, to which these pleas were designed to be answers, are, that *Woolman* was appointed school commissioner of *Grant* county, and became the successor of *Wright* in that office. The appointment is alleged under a *videlicet*, to have been made on the second day of *September*. The pleas tender an issue as to the *time* of the appointment; they aver that he was not appointed on that day.

Wright and Others v. The State, on the Relation of Woolman, &c.

This is an immaterial matter, and the pleas are bad for attempting to put it in issue.

But it is contended that the declaration is substantially defective, first, because the law does not authorize a school-commissioner to be the relator, in an action on the bond of his predecessor for failing to pay over the school funds in his hands at the expiration of his office to his successor; and, secondly, because there is no averment in the declaration of a special request of the ex-commissioner to pay the money. Neither of these objections can be sustained. By the statute of 1838, which governs this cause, suits may be brought on the commissioner's bond in the name of the State, for the use of any congressional township, school district, person or persons, injured by any breach of the same. R. S., 1838, p. 530. We think this provision entitles the successor to be the relator in an action on an ex-commissioner's bond, when the breach complained of is the failure to pay over the school funds in his hands, at the expiration of his term of service, to his successor. See *Allen et al. v. The State*, 6 Blackf., 252.(1) The condition of the bond is not, that the commissioner should pay the funds in his hands to his successor, on demand, but that he should absolutely pay them. No special demand was necessary to sustain the action; but the ex-commissioner was bound to pay the money *to his successor, within a reasonable time after he went out of office, without a demand. More than a reasonable time elapsed before this suit was commenced—nearly four years.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. Smith, and D. D. Pratt, for the plaintiffs.

J. Brownlee, for the defendant.

(1) *The State, ex rel., &c., v. Grant et al.*, post, 71.

Eaton v. The State, on the Relation of Baird.

EATON v. THE STATE, on the Relation of BAIRD.

QUO WARRANTO.—An information in the nature of *quo warranto*, under the statute, for usurping, &c., an office, should be exhibited by the prosecuting attorney, and should commence as follows: *A B*, prosecuting attorney of the — judicial circuit of the State of *Indiana*, comes here into the Circuit Court of the county of —, on, &c., and for the said State, on the relation of *C D*, of, &c., according to the form of the statute in such case made and provided, gives the Court here to understand and be informed, &c.

APPEAL from the *Randolph* Circuit Court.

BLACKFORD, J.—This was an information in the nature of *quo warranto*. The information commences as follows: The State of *Indiana*, on the Relation of *George W. Baird*, v. *Ariel K. Eaton*. On information for writ of *quo warranto*. The said *George W. Baird*, the relator in this behalf, for and in the name of the State of *Indiana*, comes now here into the said *Randolph* Circuit Court, by *John M. Wallace*, prosecuting attorney of the eleventh judicial circuit of the State of *Indiana*, and gives the Court now here to understand and be informed, that said *Ariel K. Eaton*, late of said county, gentleman, on the 15th of *September*, 1841, was then and there county auditor, &c.

Special demurrer to the information, assigning as cause of demurrer, that the relator, instead of the prosecuting attorney, gives the Court to understand, &c. Demurrer overruled, and judgment of ouster rendered against the defendant.

The statute on the subject of these informations enacts, that whenever any person or persons shall usurp, &c., any public office, &c., it shall be lawful for the prosecuting
[*66] *attorney of the proper Circuit Court, to exhibit and file in said Court one or more informations against such person or persons in the nature of *quo warranto*, on the relation of any person or persons desiring to prosecute the same, who shall be mentioned in such information or informations as the relator or relators against the person, persons, or associations thus charged, and to proceed, &c. R. S., 1838, p. 408.

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According to this statute, which is similar to the statute of *Anne* on the subject, the information in question is defective for the cause assigned in the demurrer. The information should have been exhibited, not by the relator, but by the prosecuting attorney, and should have commenced as follows: *John M. Wallace*, prosecuting attorney of the eleventh judicial circuit of the State of *Indiana*, comes here into the Circuit Court of the county of *Randolph*, on, &c., and for the said State, on the relation of *George W. Baird*, of, &c., according to the form of the statute in such case made and provided, gives the Court here to understand and be informed &c.

Per Curiam.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

J. Smith, for the appellant.

J. Brownlee, for the appellee.

SCOTT v. PURCELL and Others.

FRAUDULENT CONVEYANCE.—A purchaser of land at sheriff's sale, under a judgment against a person who had conveyed the land to defraud his creditors, stands in the place of a creditor of the fraudulent grantor, and has the same rights.

SAME.—RIGHTS OF PURCHASER.—The statute against fraudulent conveyances renders the fraudulent deed void only as to creditors, leaving it valid as to the parties themselves, and as to a *bona fide* purchaser from the fraudulent grantee for a valuable consideration.^(a)

SAME.—The title of such *bona fide* purchaser, acquired before a sheriff's sale of the land under a judgment against the fraudulent grantor, will be preferred to that of the purchaser at the sheriff's sale.

SAME.—Land descending from the fraudulent grantee is subject, in the hands of his heir, to the claim of such purchaser at sheriff's sale.

FEME COVERT.—CONVEYANCE.—A *feme covert* can not alien her real estate unless her husband join with her in the deed.

[*67] *APPEAL from the *Knox* Circuit Court.

DEWEY, J.—*Scott* brought a bill in equity against

(a) *Welby v. Armstrong*, 21 Ind., 489.

Scott v. Purcell and Others.

Purcell, Myers and Ann his wife, J. Norwood and N. Norwood. The material facts of the case, appearing from the pleadings, exhibits, and depositions, are—That *Myers*, on the 9th day of *November*, 1829, bought of *Harper* a tract of land lying in *Knox* county, took a deed of conveyance for the same, and, together with his wife, mortgaged it to *Harper*, to secure the purchase-money. On the 1st day of *December* following, *Myers*, being indebted to various persons, and among them to one *Reneau*, designing to defraud his creditors, conveyed the land to *M. Norwood*, his wife's sister, who participated in the fraud and paid no consideration. In 1833, *M. Norwood* died, leaving her brothers, *J. Norwood* and *N. Norwood*, and her sister, *A. Myers*, three of the defendants, her heirs at law. At the *March* term, 1832, of the *Knox* Circuit Court, *Reneau* obtained a judgment for his debt against *Myers*. In 1835, *Myers* and his wife sold and conveyed one undivided third part of the land (it being his wife's share as one of the heirs of *M. Norwood*) to *Hebberd* and *Burtch*, who were purchasers for a valuable consideration, without notice of the fraud practiced by *Myers* and *M. Norwood*. *Hebberd* and *Burtch* conveyed this third part, on the 30th of *November*, 1837, to *Purcell*, one of the defendants, for a valuable consideration; *Purcell* having previously, on the 16th of *November*, 1837, purchased two undivided third parts of *J. Norwood* and *Ann Myers*, who joined in a deed of conveyance; the husband of *Ann Myers* being alive but not a party to the deed. In *October*, 1837, an execution, which issued upon *Reneau's* judgment, was levied upon the same land, which, on the 27th of *November*, 1837, was sold by the sheriff on the execution. *Scott* became the purchaser, and had a conveyance from the sheriff. *Scott* had notice of *Purcell's* prior purchase from *J. Norwood* and *Ann Myers*. Who was in possession of the premises at the time of the sheriff's sale does not appear, but soon afterwards *Purcell* was. In 1832, *Harper* assigned the mortgage, executed by *Myers* and wife to secure the payment of the original purchase-money, and the mortgage-debt, to *Scott*. The bill charges *Purcell* with notice of the fraud in the sale from *Myers*

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[*68] to *M. Norwood*; and *Purcell's* answer *alleges that *Scott* knowing the fraud, if any existed, had in various ways so far sanctioned and supported that sale as fair and valid, previous to *Purcell's* purchase, as to deprive him of all right to question the title of the latter. But we do not view the evidence as sufficient to take from either *Scott* or *Purcell* the character of a *bona fide* purchaser for a valuable consideration. The prayer of the bill was, that the deed from *Myers* to *M. Norwood* might be decreed to be fraudulent and void, and for general relief.

The Court decreed that the bill be dismissed as to the two-thirds of the land held by *Purcell*; and that as to the other third (that held by *N. Norwood* as one of the heirs of *M. Norwood*), the deed from *Myers* to *M. Norwood* was fraudulent and void. Both parties appeal to this Court.

Scott, being a purchaser under *Renau's* judgment, stands in the place of a creditor of *Myers*, the fraudulent grantor, and is entitled to all the rights and privileges growing out of that relation. *Hildreth v. Sands*, 2 Johns. C. R., 35; *Sands v. Hildreth*, 14 Johns. R., 493; *Ridgeway v. Underwood*, 4 Wash. C. C. R., 129. Our statute, respecting conveyances made to defraud creditors, has been viewed, repeatedly, by this Court as being on a footing with the act of 13 Eliz. ch. 5, and as rendering the deed void only as to creditors, leaving it valid as between the parties themselves, and as to a *bona fide* purchaser, for a valuable consideration, of the fraudulent grantee. *Findley v. Cooley*, 1 Blackf., 262; *Dugan v. Vattier*, 3 Id., 245.

The difficulty in this case lies in determining whether the right of *Scott*, as the representative of a creditor of the fraudulent grantor, has been asserted in season to defeat the title of *Purcell* derived from two of the heirs of the fraudulent grantee. *Purcell's* title originated between the date of *Renau's* judgment and the sheriff's sale to *Scott*. Did *Scott's* title commence at the latter period, or is it by relation to begin at the time of rendering the judgment? A judgment by our law is a lien on the real estate of the debtor; and had *Myers* held the land in

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controversy when *Reneau's* judgment was rendered, it would, undoubtedly, have defeated any subsequent conveyance by him to a stranger. But prior to the rendition of this judgment, [*69] *Myers* had parted with his title; *it had vested in *M. Norwood*, although the conveyance was fraudulent, and liable to be set aside by the claim of a creditor, if preferred against her. The judgment against *Myers*, however, could not be constructive notice of that claim to a purchaser of *M. Norwood* or her heirs; nor could it impart to him a knowledge of the taint in her title. To consider the lien of a judgment against a debtor, who had fraudulently conveyed his land, as binding upon it in the hands of the grantee, though consulant of the fraud, would result in the defeat of the title of a fair purchaser from that grantee, for a valuable consideration. Such a result would be equally incompatible with the established construction of the statute against fraudulent conveyances, and the well settled doctrine of the common law.

Our opinion is, that the title of a purchaser at sheriff's sale, under a judgment against such a fraudulent debtor, can derive no strength from any lien arising from the judgment; that it dates only from the sale; and that it must yield to the older title of a *bona fide* purchaser for a valuable consideration, who derives his claim from the fraudulent grantee or his heirs. This view of the subject is in accordance with a decision made on much deliberation by the Court of Errors in *New York*. *Anderson v. Roberts*, 18 Johns. R., 515; see also *Manhattan Co. v. Evertson*, 6 Paige, 457.

We have laid no stress upon the conveyance made by *Ann Myers* jointly with *J. Norwood* to *Purcell*. Being a married woman, she could not alien her real estate without joining in a deed with her husband. But the title of *Purcell* to two-thirds of the premises in dispute is valid, by his purchase of one-third from *J. Norwood*, and of the other third from *Hebberd* and *Burtch* who held immediately under *Myers* and his wife.

The title of *Scott* must prevail as to the share of *N. Norwood*, being one-third of the land sold at the sheriff's sale. This share descended to him from the fraudulent grantee; and he

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took it subject to the claim of the creditors of her grantor, or of a purchaser under a judgment of a creditor.

The Circuit Court committed no error in the decree which they rendered.

It should be remarked, that no notice was taken in [*70] the *decree of the mortgage given by *Myers* and wife to *Harper*, and by him assigned to *Scott*, and the state of the pleading justified the omission. Neither *Scott* nor *Purcell* took any more than an equity of redemption by their respective purchases, for that was the only interest possessed by *Myers* in the premises. He had parted with the legal estate by giving the mortgage. We do not consider the rights of *Scott*, whatever they may be, as the assignee of the mortgage, to be affected by the decree of the Circuit Court.

Per Curiam.—The decree is affirmed with costs.

J. Whitecomb, J. Law, and A. T. Ellis, for the appellant
S. Judah, for the appellees.

THE STATE v. CROMWELL and Another.

SHERIFF'S BOND.—The declaration, in a suit by the State on a sheriff's bond, need not aver that the bond had been approved and recorded

ERROR to the Clay Circuit Court.

DEWEY, J.—Debt against a sheriff and his sureties on his official bond, conditioned for the faithful discharge of his duties. Breach, that the sheriff voluntarily permitted a prisoner, who had been convicted of a crime and fined, to escape. Special demurrer to the declaration, assigning for cause, that it did not appear that the bond had been "approved and recorded as required by law." The Court sustained the demurrer and rendered judgment for the defendants.

This decision was wrong. There was no need of averring that the bond had been approved or recorded. Neither was essential to its validity.

The State, on the Relation, &c., v. Grant and Others.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna for the State.

[*71] *THE STATE, on the Relation, &c., v. GRANT and Others.

CONGRESSIONAL TOWNSHIP—RELATOR—SCHOOL FUNDS.—A Congressional township can not be the relator in a suit, brought on the bond of an ex-school commissioner, for the commissioner's not paying over to his successor, or the township trustees, the school funds of the township remaining in his hands at the expiration of his term of service; no demand having been made on him for the money while he was in office.

SAME.—The successor of the ex-commissioner should, in such case, be the relator.

ERROR to the *Decatur* Circuit Court.

DEWEY, J.—The State, on the relation, &c., brought an action of debt against *Grant*, an ex-school commissioner of *Decatur* county, and his sureties, on his official bond, conditioned for the faithful discharge of his duties, and for the delivery over to his successor of all moneys, papers and books belonging to the office, which might be in his hands at the expiration of his term of service. The declaration shows that while *Grant* was in office, he received \$600 for interest on moneys belonging to Congressional township No. 10 in *Decatur* county; that he resigned and was succeeded by one *White*, who was in office at the commencement of the suit; that after the resignation of *Grant* and the appointment of *White*, the relators made their draft on the school commissioner for the interest money in *Grant's* hands, which draft was duly recorded; that it was presented to *White*, who did not, and could not, pay it, because *Grant* had not paid over the money to him. The breach assigned is, that *Grant*, though often requested by his successor and by the relators to pay the money to one or the other of them, failed to do it, and still

retained it in his hands. A general demurrer to the declaration was sustained, and final judgment rendered for the defendants.

The question raised by the demurrer is, whether a Congressional township can be the relators, in an action against an ex-school commissioner and his sureties on his official bond, for his failing to pay over to his successor or to the township trustees, the school funds belonging to such Congressional township, remaining in his hands at the expiration of his term of service, no demand having been made of him while in office?

We think that, under the proper construction of [*72] the statute *bearing upon this subject, the answer must be in the negative.

The act of 1838 respecting Congressional townships and schools therein, which governs this cause, provides that school commissioners shall keep a separate account of the funds belonging to each Congressional township within their respective jurisdictions, and of their transactions in relation to the same; that they shall make a calculation of the interest in their hands, which shall have accrued on the school moneys, as well as on all other moneys liable to be drawn for school purposes, on the first Mondays of *March* and *September* annually, and shall pay over the same on the draft of the township trustees, which draft the trustees shall make, semi-annually, on the first Mondays of *March* and *September*, or within twelve days thereafter, and cause it to be recorded by their clerk in his book; and the commissioner, on paying such draft, shall file it as a voucher. R. S., 1838, pp. 511, 526. The statute also provides that suit may be brought on a commissioner's bond, in the name of the State, for the use of any Congressional township, school district, person or persons, injured by any breach of the same. R. S., 1838, p. 530.

The Congressional township may, undoubtedly, under this last provision, be the relators in their corporate name in an action on the commissioner's bond, if they have sustained an injury by the breach of it. But they can have no claim upon

The State, on the Relation, &c., v. Grant and Others.

him for interest money, unless he has failed to pay the written order of their trustees for it. No such failure is alleged against *Grant*. No draft was drawn on the school commissioner while he was in office. And he can not have committed a breach of his bond, since he left the office, by not paying money to the Congressional townships. It would have been against this bond to have done so, for the condition is that he should pay all moneys in his hands, at the expiration of his term of service, to his successor. Besides, it would have been impossible for him to pay money to the trustees after he ceased to be commissioner, and comply with the law, for he could neither keep an official account of the payment, nor file away the order on which it was paid; he would have no access to the books or files of the office. Indeed, the [*73] payment itself would have been an official act, *which he had no more right to perform, than he had to receive moneys belonging to the school fund. We do not mean to say, that, had he been liable to a township while he remained in office, he might not afterwards have made a voluntary payment to the trustees, or been liable to a suit on his bond for the use of the township. This is a doubtful question, which we are not now called upon to settle. But not having so been liable during his continuance in office, he had no right to pay the money afterwards to the trustees. There has, therefore, been no breach of his bond in failing to pay money to the trustees.

A breach was, however, committed by the failure of the ex-commissioner to pay over to his successor whatever school funds, from whatever source derived, remained in his hands when he went out of office; and this breach may have been, in its remote consequences, injurious to the township, by causing delay in the reception of their money; and it may have been, also, equally injurious to every school district in the county. But the immediate injury was to his successor, as the representative of the entire school fund of his jurisdiction. And the successor it is, who should be the relator in an action for a breach of the bond in not paying over money to himself. He

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can collect the funds, and disburse them to the subdivisions of the county, and keep an official account of his transactions with the various townships as required by the statute. But to suffer each township and each school district, which may have been consequently injured by that single breach of the bond, to institute a suit as relators, would not only cause an interruption in the official account of the school funds, but it would also encourage a great multiplicity of actions, when one may effect a complete remedy. This is a result which Courts always prevent if possible.

The demurrer to the declaration was correctly sustained.(1)

Per Curiam.—The judgment is affirmed at the costs of the relators.

G. H. Dunn, for the plaintiff.

(1) *Vide* Acts of 1843, p. 84.

[*74] *KREGER v. OSBORN and Others.

TRESPASS—JUSTIFICATION, LEGAL PROCESS.—To a declaration in trespass charging that the defendant assaulted, seized, violently pulled and dragged about, struck, and imprisoned the plaintiff, a plea justifying the arrest and imprisonment by virtue of legal process, is bad.

SAME.—The plea in such case should show that the acts of violence were rendered necessary by the resistance of the plaintiff.

CAPIAS WITHOUT AFFIDAVIT.—A *capias ad respondendum* issued by a justice of the peace, without an affidavit, against a person not a resident and householder of his county, operates as a summons, and does not justify an arrest and imprisonment.(a)

PROCURING AND ISSUING ILLEGAL WARRANT.—A party who causes a magistrate to issue, and the magistrate who issues, legal process, are not responsible for the unlawful manner of serving it, unless they participate in the unlawful act.

ERROR to the *Clay* Circuit Court.

DEWEY, J.—Trespass by *Kreger* against *Osborn, Reed,*

(a) See *Byers v. The State*, 20 Ind., 47.

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Bailey, and *Moss*. The declaration contains two counts. The first count alleges that the defendants assaulted, seized, violently pulled and dragged about, struck with many blows, and imprisoned the plaintiff. The second count charges an assault and battery, and imprisonment of the plaintiff by the defendants. *Moss* pleaded separately the general issue and a justification. The latter, after specifying the trespasses mentioned in the first and second counts, and alleging them to be one and the same trespass, sets forth that *Kreger* was indebted to *Reed* and *Bailey* on a promissory note made by him; that they applied to *Osborn*, a justice of the peace, to issue process against *Kreger* on the note; that *Osborn* issued a *capias ad respondendum* directed to *Moss*, a constable, commanding him, &c.; that he, *Moss*, gently laid his hands on *Kreger* and arrested him by virtue of the writ, and carried him before the justice as he was commanded, and thereby necessarily imprisoned him. *Osborn*, *Reed*, and *Bailey* joined in the general issue, and also in a special plea like that of *Moss*, with the additional allegation, that *Kreger* was not a resident and householder of the county where the process issued. The plaintiff demurred generally to both special pleas, and the demurrers were overruled. Final judgment for the defendants.

We can not sustain this judgment. Admitting for the present, that the writ authorized the arrest and imprisonment of

Kreger, the special plea of *Moss* is clearly bad. The [*75] writ *was no justification of the violence alleged to have been committed upon *Kreger* in dragging him about and striking him. To justify these acts resistance to the officer was necessary, and should have been alleged in the plea. If no such violence took place, not guilty should have been pleaded to that part of the declaration alleging it, and a justification to the rest. 1 Saund., 296, n. 1; *Phillips v. Howgate*, 5 B. and Ald., 220. But in our opinion the writ conferred no power upon the constable to arrest *Kreger*. The act abolishing imprisonment for debt provides that special bail shall in no case be required, unless the affidavit, prescribed by the statute, shall be first made. Laws of 1842, p. 68. No affidavit ap-

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pears to have been made before the arrest of *Kreger*. It is true, the statute does not expressly prohibit the arrest of a debtor on an ordinary *capias ad respondendum*. But as no special bail can be required in such case, an arrest would be futile. The statute is a virtual prohibition of an arrest when the required affidavit is wanting. We are aware of the difficulty arising from a comparison of this statute, thus construed, with the twenty-fifth section of the justices' act. That section makes a *capias ad respondendum* the proper and only process in all cases where the defendant is not a resident and householder of the county where the process issues. It authorizes the arrest of the debtor, and his immediate conveyance before the justice; and it requires the justice to hold him to special bail, or to imprison him if bail is refused. The law of 1842 expressly repeals all laws and parts of laws which conflict with its provisions. That the authority, given by the justices' act to the constable to arrest a debtor, and take him before the justice, and to the justice to hold him to bail or imprison him, is repealed, admits not of a doubt. But if the whole of the twenty-fifth section be considered as repealed, it follows that a justice of the peace has no authority to issue any process against persons not residents and householders of his county. This, certainly, was not designed to be the effect of the law abolishing imprisonment for debt; and there is nothing in that law absolutely inconsistent with the right of a justice to *issue* the ordinary *capias ad respondendum*. We think the difficulty may be obviated by viewing this kind of process as

[*76] lawful, but as operating only *as a summons. There is nothing new in the idea of viewing a *capias ad respondendum* in the character of a mere summons. In ordinary personal actions, the Circuit Courts issue no other kind of process; and the writ, when bail is not required, has always operated in that character. As the justice's *capias ad respondendum* against a person not a resident and householder is a *forthwith*, it must, hereafter, until the Legislature shall see fit to give a more appropriate process, be considered as a summons to appear immediately before the justice, who can fix the day

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of trial in the manner heretofore practiced when the arrest and imprisonment were lawful; and the defendant must take the consequences if he does not appear on the appointed day. It is needless to remark that the constable, having nothing but a summons against *Kreger*, had no authority to arrest and imprison him. And there is really no hardship upon the constable in this view of the subject, for he was bound to know that no form of civil process from a justice of the peace, which did not show that the affidavit of fraud required by the statute of 1842 had been made, could authorize him to arrest and imprison a person.

It follows from what has been said, that the special plea of the other defendants is no justification of any of the injuries complained of in the declaration. But it should be remarked, that, if they did nothing more than cause to be issued and to issue the *capias ad respondendum* against *Kreger*, he not being a resident and householder of the county where it issued, they are not trespassers. It has been shown that the writ was legal process, though it did not authorize an arrest and imprisonment. And neither a party who procures, nor the magistrate who issues legal process, is accountable for the manner in which it is executed, however unlawful that may be. To render them joint trespassers with the officer who executes the writ, they must participate, either by assisting, commanding, or advising, in his improper conduct.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiff.

J. Cowgill and *E. W. McGaughey*, for the defendants.

END OF NOVEMBER TERM, 1843

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1844, IN THE TWENTY-EIGHTH
YEAR OF THE STATE.

MULLIKIN and Others v. THE STATE.

PLEADING.—A plea which professes to answer the whole cause of action, but answers only a part, is bad.

SURPLUS REVENUE.—An agent of the surplus revenue is bound to pay the interest received by him as such agent to the school commissioner, without demand.

SAME—AGENT.—The act of the 15th of *February*, 1841, by which the agents of the surplus revenue were continued in office, was a new appointment; and for the subsequent defalcations of any such agent, his sureties in a bond, given previously to such appointment are not liable.

ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—Debt by the State against the plaintiffs in error on the official bond of the agent of the surplus revenue for *Fayette* county.

The declaration states that at the *May* term, 1840, of the board of commissioners of *Fayette* county, *Mullikin* was appointed the agent of said fund; that he took the oath of office

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and entered into bond according to law; and that he received from his predecessor in office a large sum of money, to wit, the sum of \$10,500, &c. The breaches are, 1, That on the —— day of ——, 1841, one *William Watton* was, by the [*78] board of commissioners of *Fayette* *county, appointed to succeed *Mullikin* in said agency; that he demanded of him the moneys, &c., in his hands appertaining to said agency, but that *Mullikin* wholly failed and neglected to pay the same to said *Watton*, and still fails, &c. 2, That *Mullikin* failed and refused to pay over a large amount of interest money, to wit, the sum of \$1,500, received by him as such agent, to the school commissioner of the county of *Fayette* so soon as the same was received by him, or at any time thereafter, although there was at all times a school commissioner in said county authorized to receive it, &c.

The defendants pleaded six pleas. The second and sixth pleas were demurred to. The second plea professed to be an answer to the whole declaration, but was an answer only to the first breach. The demurrer to it was therefore correctly sustained. The sixth plea was to the second breach only, and averred that the school commissioner had not demanded of *Mullikin* the interest money in his hands, &c. The Court did right also in sustaining the demurrer to that plea. By the statute, it is made the duty of the agent to pay over to the school commissioner the interest money that may come to his hands so soon as it shall be received by him. The agent is but the collector of the interest arising on the loans; the school commissioner is the officer to whom its safe keeping is intrusted. If the agent fails to pay over according to the statute, he is guilty of a breach of his bond, and a demand is not necessary before suit brought.

On the first, third, fourth, and fifth pleas issues were formed, and a verdict was given for the plaintiff. Final judgment was thereupon rendered against the defendants.

At the trial, the defendants asked the Court to give to the jury the following instructions, viz.: If the jury can not form any conclusion from the evidence, whether the money which

was received by *Mullikin* as such agent, and which he failed to pay over, was received by him before the expiration of his term of office or afterwards, they should not find against his sureties the amount so received. 2, If *Mullikin* was appointed agent, &c., by the board of county commissioners in *May* 1840, to fill out the term for which *Samuel Reese* was [*79] *appointed by the Legislature at its preceding session for one year, and until his successor should be appointed and qualified, and the bond sued on was executed by *Mullikin* and the other defendants as his sureties, and at the session of the Legislature next following, *Mullikin* was continued in office as such agent by an act of the Legislature, and acted under such re-appointment, his sureties are not liable for any moneys that came into his hands under and after such re-appointment; and if the jury can not determine from the evidence whether the money which *Mullikin* received and failed to pay over, came into his hands before or after such re-appointment, they should not find a verdict against the sureties for the money so received.

To understand the relevancy of the instructions, it is necessary to advert to the facts of the case. On the 24th of *February*, 1840, *Samuel Reese* was appointed by the General Assembly the agent for loaning and managing the surplus revenue, for the county of *Fayette*, for the term of one year from the first day of *March*, 1840, and until his successor should be appointed and qualified. *Reese* refused to accept, whereupon the board of county commissioners at the *May* term, 1840, appointed *Mullikin* to fill the vacancy. *Mullikin* accepted the appointment, and was qualified by taking the oath of office, and, with his sureties, executing the bond on which this suit is brought. By the act of *February* the 15th, 1841, (Acts of 1841, p. 192), the agents then in office in the several counties in the State were continued in office so long as their services might be needed, and power to fill any vacancy that then existed or which might thereafter occur was conferred upon the board of county commissioners; and it was provided that all agents so appointed should be qualified to discharge their

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duties according to the laws then in force, &c. Previously to the act of *February* the 15th, 1841, the appointment of agents to loan and manage the surplus revenue fund in the several counties, was annually made by the General Assembly.

It appeared in evidence, on the trial of the cause, that *Mullikin* continued to act as agent after the 1st of *March*, 1841, and until the month of *January* following, when he was superseded by *William Watton*, by virtue of an appointment [*80] *from the board of county commissioners; that no new bond was given; that *Mullikin* and *Watton*, soon after the appointment of the latter, accounted together of the amount of money, &c., in the hands of the former, from which it appeared that there was a large sum of money in his hands; that he failed and refused to pay the same over, &c. There was no testimony to show, whether the money came to the hands of *Mullikin* previously, or subsequently, to the 1st of *March*, 1841.

We think it very clear that the instructions asked should have been given. At the time *Mullikin* was appointed, his term of office would expire on the 1st day of *March*, 1841; and the bond sued on was given to secure the faithful performance of his duties until that period, and until his successor should be appointed and qualified. The statutory appointment under which he acted after the 1st of *March*, 1841, was a new commission, and although no additional duties were imposed, the appointments, in their tenure, were essentially different. The first was an annual appointment, the second was one of unlimited duration. A surety can not be bound beyond the scope of his engagement, and his undertaking is to be strictly construed.

Mullikin having continued to act as agent after the 1st of *March*, 1841, must be viewed as acting under the law which continued him in office. For any defalcations, therefore, that happened after that period, his sureties in the bond now sued on are not liable. *United States v. Kirkpatrick*, 9 Wheat., 720; *Leadley et al. v. Evans*, 2 Bing., 32; *Peppin v. Cooper*, 2 B. & Ald., 431; *Rany v. The Governor*, 4 Blackf., 2.

Armstrong and Another v. The State, on the Relation of Morrow, &c.

Objections were made by the defendants to the testimony of *Watton* and other witnesses, which were overruled by the Court, but which on account of its irrelevancy, should have been sustained. The testimony was offered to prove a deficit in the accounts of *Mullikin* at the time he accounted with *Watton*, that is, in *January* or *February*, 1842, but not to prove a defalcation during the time covered by the bond. The testimony should have been confined to defalcations during the time for which the sureties became liable.

[*81] **Per Curiam*.—The judgment is reversed. Cause remanded. &c.

C. B. Smith and *J. S. Newman*, for the plaintiffs.

S. W. Parker, and *C. H. Test*, for the defendant.

ARMSTRONG and Another v. THE STATE, on the Relation of MORROW, &c.

SURETY OF GUARDIAN, LIABILITY.—When the surety of a guardian becomes dissatisfied, and applies to be discharged from further responsibility, and a further bond with additional surety is thereupon given for the performance of the condition of the former bond, the surety in the new bond is liable for the previous as well as subsequent defalcations of the guardian.

PRACTICE.—In debt on a bond with a conditon, the judgment for the plaintiff was for the penalty, and also for the damages assessed and costs. *Held*, that that part of the judgment which was for the damages assessed, was erroneous.

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—The State, on the relation of *Rebecca Morrow*, an infant, by *Sulgrove* her guardian and next friend, brought an action of debt against *Armstrong* and *Bell*. The declaration alleges, that, on the 10th day of *November*, 1835, *Armstrong* was appointed guardian of the relator, and gave bond, with one *McCaw* as his surety, in the penalty of \$1,000, conditioned for the faithful discharge of his duties and trusts as guardian; that on the 21st day of *March*, 1840, *McCaw* applied to the

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proper authority to be discharged from subsequent liability on his bond; and that *Armstrong* having been required to execute a further bond, with additional security, for the performance of the condition of the first bond, the defendants did thereupon execute the obligation on which this suit is founded to the State of *Indiana*, in the penalty of \$1,000, the condition of which, after reciting the above facts, is, "that *Armstrong* should faithfully perform the trusts of his guardianship, being the condition of the said former bond." The declaration also alleges that the new bond was approved by the proper authority "as the further bond of *Armstrong*;" that *McCaw* was discharged from subsequent liability; that *Armstrong* failed to discharge the duties of guardian, and was, on the 8th day of [*82] *October*, 1841, removed *from his trust, and his authority revoked; and that *Sulgrove* was appointed the guardian of the relator.

The first breach assigned is, that after the appointment of *Armstrong* as guardian, and after the execution of the bond by him and *McCaw*, and before the revocation of his guardianship, there came to and was in his hands and possession as guardian \$1,000 belonging to his ward; and that *Sulgrove*, after his appointment as guardian, and before the commencement of the suit, demanded of *Armstrong* to account for and pay over to him whatever money he had received belonging to *Rebecca Morrow*; that *Armstrong* refused; and that he had never accounted to the Probate Court.

The second breach need not be set out, because, as to that, there were issues of fact from which no question arises.

Armstrong made default. *Bell* demurred specially to the first breach, assigning for cause of demurrer, that it did not appear whether *Armstrong* had received the money of his ward before or after the execution of the bond on which the action is founded. The Court overruled the demurrer. The trial of the issues upon the second breach, and the assessment of damages, were submitted to the Court. The Court found for the defendant on one of the issues, and assessed the plaintiff's damages upon the first breach at \$498.53. Judgment in

Armstrong and Another v. The State, on the Relation of Morrow, &c.

favour of the plaintiff for the penalty of the bond, and also for the damages assessed and costs, with an award of execution for the latter.

The only question of any importance in this cause arises from the demurrer to the first breach of the bond assigned in the declaration. It is contended in behalf of *Bell*, that he is liable as the surety of *Armstrong* only for such money as the latter held as guardian at the date of the second bond—that executed by *Bell*—or such as he received subsequently thereto; and it is insisted that the breach is bad for want of certainty in these particulars.

But the view we take of the subject renders this matter of no consequence. Our opinion is, that the condition of the new bond embraces all the defalcations of *Armstrong*, as well those which took place before its execution, as those which happened afterwards.

The statute for the relief of the sureties of certain [*83] officers, *provides that the surety of various persons, including guardians, wishing to discharge himself from further liability on his bond, may apply in the manner pointed out for such discharge; upon which, the principal shall be required to execute “a further bond for the performance of the condition of the former bond, with such additional security as may be approved,” &c.; and on the execution of the new bond, the applicant for relief shall be exonerated from subsequent liability on the bond executed by him. R. S., 1838, pp. 423, 424.

It is evident, we think, that the Legislature in requiring a *further* bond, with *additional* security for the performance of the *condition of the first bond*, did not mean that the new bond should be limited to such delinquencies of the principal as should take place after its date, but that it should include every liability incurred under both bonds. With this view the obligation on which the action is founded was given; and though the condition might have been framed in apter words, it is sufficient to accomplish its object. The expression, “being the condition of the former bond,” shows that the intention of

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the parties was to comply with the law, and assume the required responsibility. We think the Circuit Court was correct in overruling the demurrer.

But an error was inadvertently committed. The judgment should not have included the damages found by the Court; that portion of the judgment is erroneous.

Per Curiam.—The judgment as to the damages assessed is reversed, and is affirmed as to the residue.

W. W. Wick and *L. Barbour*, for the appellants.

C. Fletcher and *O. Butler*, for the appellee.

BYRKET v. MONOHON.

SLANDER.—When the plaintiff, in an action of slander, proves the speaking of the actionable words laid in the declaration, the law implies that the words are *false*, and that they were spoken *maliciously*, unless there is evidence sufficient to satisfy the jury to the contrary.

SAME—PERJURY—JUSTIFICATION.—If in slander for charging the [*84] plaintiff with perjury, the defendant justify on the ground that the words are true, the plaintiff may prove, on the trial, his general good character for truth.

SAME—PROOF.—To prove, in support of such justification, the falsity of the plaintiff's statement, two witnesses, or one witness and strong corroborating circumstances, are necessary; but to prove the other allegations in the plea, one witness is sufficient.(a)

SAME—AGGRAVATION OF DAMAGES.—On the trial in such case, the jury were instructed that if the defendant had failed to prove the plea to be true, the filing of the plea was a great aggravation of the slander, and the jury should take that circumstance into consideration in assessing the damages. *Held*, (without determining what would be the effect of the plea were there no evidence introduced in its support), that the instruction must in this case be erroneous, as it did not necessarily follow, as the instruction supposed, that the justification, if not fully proved, should aggravate the damages.

MITIGATION OF DAMAGES.—Where the plea of justification in such case is not entirely proved, but the evidence given under it shows that the defendant had reason to believe, from the plaintiff's conduct, that the charge was true, such evidence may be considered by the jury in mitigation of damages.(b)

(a) *Lanter v. McEwen*, 8 Blackf., 495.

(b) See *Shoulty v. Miller*, 1 Ind., 544; Id., 170; Id., 92.

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APPEAL from the *Henry* Circuit Court.

BLACKFORD, J. — *Monohon* brought an action of slander against *Byrket* for charging him with perjury. Plea, that the charge was true. Replication, *de injuria*. Verdict and judgment for the plaintiff.

On the trial, the Court, on the plaintiff's motion, instructed the jury as follows:

1, If the statement was false, and was deliberately made with a full knowledge of its falsity, you may infer the corrupt intention. Whether the statement was thus made, or whether it was the result of mistake, ignorance, or inadvertence, are questions for your determination, looking at all the facts of the case. 2, If the defense be doubtfully sustained, you may take into consideration the plaintiff's general character as a man of truth and integrity. But if, on the contrary, you should be satisfied from the evidence that he committed perjury on the trial, his character however good would be wholly immaterial. 3, Two witnesses, or one witness and strong corroborating circumstances, are necessary to sustain the truth of the plea. But the necessity of more than one witness is confined to the proof of the falsity of the plaintiff's statement. As to all the other material allegations in the plea, except the falsity of the statement, one witness is sufficient. 4, To sustain the issue on the defendant's part, he must have proved the plea of justification to be true by two *witnesses, or by one witness and strong corroborating circumstances; and if he failed to do so, the jury must find for the plaintiff. 5, The only issue in this cause is, whether the plaintiff is guilty of perjury or not? and if the defendant has failed to prove that his plea is true, and that the plaintiff **was guilty of perjury**, it is a great aggravation of the slander to have the truth of the charge alleged and placed on the record by the plea; and the jury should take it into consideration in assessing the damages against the defendant.

To all these charges the defendant excepted.

The defendant has no reason to object to the first instruction. When the plaintiff, in an action of slander, proves the speak-

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ing of the actionable words laid, the law implies that they are *false*, and that they were spoken *maliciously*, unless there is evidence sufficient to satisfy the jury to the contrary. *Yeates et ux. v. Reed et ux.*, 4 Blackf., 463; *Roberts v. Camden*, 9 East, 93.

The second instruction is unobjectionable. The defendant undertook to prove that the plaintiff had committed perjury; and the jury, in making up their minds on the subject, had surely a right to take into consideration, if the defense was not clearly proved, the general good character of the plaintiff for truth. Indeed, it would seem that such evidence ought never to be withdrawn from the jury, though it will often be rendered of no avail by the nature of the defendant's evidence. If the plaintiff were indicted for the offense, it would be proper for the jury, in making up their verdict, to take into consideration his general good character for truth; *Roscoe's Crim. Ev.*, 72; and the law must be the same in the case before us.

The third and fourth instructions are correct. There could be no objection to them, had the trial been on an indictment against the plaintiff for perjury. *Roscoe's Crim. Ev.*, 686; *Regina v. Yates*, 1 Carr. & Marshman, 132; and the law on the subject must be the same in this case. See *Woodbeck v. Keller*, 6 Cowen, 118; *Offutt v. Earlywine*, 4 Blackf., 460; *Chalmers v. Shackell*, 6 Carr. & Payne, 475.

The fifth instruction is erroneous. The plea of justification was not, so far as appears by the record, any ground for increasing the damages. What would be the effect of [*86] the *plea, if no evidence tending to sustain it was given, we shall not now determine. It is sufficient for the decision of this case to say, that it does not necessarily follow, as this instruction supposes, that the justification, if not fully proved, should aggravate the damages. The plea may not have been entirely proved, and yet if the evidence introduced under it showed that the defendant had reason to believe, from the plaintiff's conduct, that the charge was true, the damages could not be increased in consequence of the plea, as the evidence given under it would then go in mitigation of

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damages. *Chalmers v. Shackell, supra.* See, also, *Sanders v. Johnson*, 6 Blackf., 50.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker and *C. H. Test*, for the appellant.

C. B. Smith and *J. S. Newman*, for the appellee.

SMITH v. CALLOWAY.

STATUTE OF LIMITATIONS—CHANCERY PRACTICE.—The statute of limitations may be pleaded to a suit in equity, if the subject-matter of the suit be cognizable at law as well as in equity.

SAME.—But in those cases of trusts which are exclusively within the jurisdiction of a Court of chancery, the statute of limitations can not be pleaded.

SAME—TRUST—ADMINISTRATOR. —An administrator is a trustee for a person entitled to a distributive share of the estate; and the trust, in such case, is exclusively within the jurisdiction of a Court of chancery.

SAME.—To a suit in chancery, therefore, by a person entitled to such share, against an administrator, the statute of limitations can not be pleaded.

SAME.—If the husband of an administratrix act in the administration of the estate, as he may do, a trust is raised in him which is exclusively within the jurisdiction of a Court of equity.(a)

SAME.—Although the statute of limitations can not be pleaded to a suit in chancery against an administrator for a distributive share of the estate, length of time may be relied on as presumptive evidence of payment.

ERROR to the *Wayne* Circuit Court.

SULLIVAN, J.—The complainant in this case filed a bill in chancery, to recover from the defendant his distributive share of the estate of his deceased father, *Josiah Smith*.

The bill states that *Josiah Smith* departed this life in the year 1805, in the county of *Montgomery* and State of
[*87] *Ohio*, *leaving *Letitia Smith* his widow, and *Thomas Smith* and the complainant his children and heirs at law; that at the *August* term, 1805, of the Court of Common Pleas of *Montgomery* county, *Ohio*, letters of administration on the estate of the said *Josiah* were granted to his widow *Letitia*;

(a) *Keister v. Howe*, 3 Ind., 268.

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that she made an inventory of the personal property of the deceased, which amounted to \$1,751, and had it recorded; that previously to making the inventory, the administratrix intermarried with the defendant, who, after the inventory was made and recorded, took possession of the property and refused to permit the administratrix to proceed with the administration, and appropriated the property to his own use. The bill states further that the administratrix died in the year 1831; that the complainant was a minor of the age of ten years when his father died, and that he remained in ignorance of his rights until the death of his mother; that, by the laws of the State of *Ohio*, he is entitled to one-third of his father's estate, &c. The bill prays that the defendant may be compelled to account, &c.

The defendant, in his answer, admits the death of *Josiah Smith*, and the appointment of his widow *Letitia Smith* as his administratrix, as stated in the bill; he admits that in the year 1805 he intermarried with the said *Letitia*; he says that previously to the marriage, the said *Letitia* and her eldest son *Thomas* made the inventory mentioned in the bill; that immediately after his marriage with said *Letitia*, they removed to the defendant's house in the neighbourhood taking with them only about \$200 worth of said property, being less than the amount to which said *Letitia* was entitled by law; that the residue of the property remained on the farm recently occupied by *Josiah Smith*, in the possession of his son *Thomas* for the benefit of said *Thomas* and the complainant; that in consequence of the great lapse of time, the defendant does not recollect all the facts of the transaction, but he is informed and believes that the complainant possessed himself of his portion of the property of said estate; that he has received all the property which his mother *Letitia* brought with her to the house of the defendant, &c. He denies having intermeddled with the property of said estate; avers that the [*88] complainant *has been paid his distributive share, and relies upon the presumption of payment arising from the lapse of time, &c.

The defendant, in addition to his answer, pleaded the statute of limitations as a bar to the relief asked by the complainant. The complainant replied and depositions were taken. At the hearing, the Court dismissed the bill for want of equity.

The first question to be considered is, whether the statute of limitations is well pleaded? It is not denied by the plaintiff's counsel but that the statute may, in a proper case, be pleaded in bar in equity as well as at law, but it is denied that this is such a case.

Courts of equity allow the statute to be pleaded as a bar in all cases where the jurisdiction of Courts of law and Courts of equity, on the subject-matter of the suit, is concurrent. As, for example, where a bill in chancery was filed to recover money collected by an attorney and not accounted for, the statute of limitations was allowed to be a good plea in bar, because the defendant, if he had been sued at law on the same demand, might have availed himself of it. *Kinney's Ex'rs v. McClure*, 1 Rand., 284. The principle applies to all those cases of trust where a person receives money to be paid to another, or to be applied to a particular purpose, and which is not so paid or applied, by means whereof he is suable either at law or in equity. So, in cases of account, mistake, &c. If Courts of chancery did not adopt the statute and apply it in such cases, a creditor might always elude it by electing to pursue his remedy in equity.

But in those cases of trusts, frauds, &c., which are peculiarly and exclusively within the cognizance of a Court of equity, the statute can not be pleaded. This subject underwent a very elaborate investigation in the case of *Kane v. Bloodgood et al.*, 7 Johns. Ch. R., 90, and was examined also in *Murray v. Coster*, 20 Johns. R., 576, and the rule established by those cases, as well upon authority as the soundest principles of policy, is, that the trusts not to be reached or affected in equity by the statute of limitations, as between the trustee and *cestui que trust*, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of chancery.

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[*89] *An administrator of an estate is a trustee for a person entitled by law to a distributive share of that estate. The trust is a direct one, and such as Courts of chancery have exclusive cognizance of, not only by the contemplation of our statute, but by the general principles of law. The defendant, therefore, can not avail himself of the statute as a bar in this case, provided he is to be treated as the administratrix would be treated, if she were alive and a party with him to this suit. If a married woman be an executrix or administratrix, the husband has a joint interest with her in the effects of the deceased, such as devolves the whole administration upon him, and enables him to act in it to all purposes with or without her assent. *Ankerstein v. Clarke et al.*, 4 T. R., 616; *Yard v. Eland*, 1 Ld. Raym., 368; 1 Salk., 306. But the wife has no right to administer without the husband, and in general any act, if performed by her without his concurrence, will be of no validity. Salk., 117, 306. If, therefore, the husband acts at all, the law raises a trust which is peculiarly the subject of equity cognizance.

In this case it is averred that the defendant took possession of the personal property, refused to permit his wife to proceed with the administration, and appropriated the property to his own use. He is proceeded against as a trustee by the *cestui que trust*, and, under the circumstances as we have shown, can not set up the statute in bar of the plaintiff's claim.

The defendant, in addition to his plea, has answered the bill, and avers a performance of the trust by a distribution of the personal effects of *Josiah Smith*, deceased, according to the laws of *Ohio*; and, in the absence of direct proof, relies upon the lapse of time as presumptive evidence of performance. The statute of distribution of the State of *Ohio*, is, by agreement of counsel, made a part of the case. This defense is legitimate. Courts of chancery, from an indisposition to encourage laches or indolence in a party in the prosecution of his rights, will, after a great lapse of time, presume some composition or release to have been made. Therefore, a legacy, or a claim for the distributive share of an estate, to which the statute of limita-

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tions can not be pleaded as a bar, will, if the demand be stale, be presumed to have been paid. *Parker v. Ash*, 1 [*90] *Vern.*, 256; *Sturt v. Mellish*, 2 *Atk.*, 610; **Higgins v. Crawford*, 2 *Ves.*, jun., 571; *Arden v. Arden*, 1 *Johns. C. R.*, 313; *Durdon v. Gaskill*, 2 *Yeates*, 268.

The claim set up in this case is stale, and we concur with the Circuit Court in the opinion that the complainant, on account of the staleness of the demand, is not entitled to a decree. The complainant arrived at mature age in the year 1816, and the bill was filed in the year 1842, twenty-six years after the removal of the disability of age. During fifteen years of this latter period, his mother, the administratrix, was alive. His entire silence, during this long period, affords a strong presumption that his right had been acknowledged and his claim satisfied. There is but one deposition on file, and there is nothing in that deposition to rebut the presumption. The complainant can not be presumed to have been ignorant of the fact, that he was entitled to a distributive share, more or less, of his father's estate. If he were suing for a legacy, the presumption might be otherwise. But in this case the averment of ignorance can not avail him, and the presumption is, that if his claim had not been satisfied it would have been asserted at an earlier period.

Per Curiam.—The decree is affirmed with costs.

J. S. Newman, for the plaintiff.

J. Rariden, for the defendant.

THE STATE v. BOYLES

CONSTITUTIONAL LAW.—The statute of 1842, applying certain funds to purposes of education, is constitutional.

LIABILITY OF JUSTICE, NOT PAYING OVER FEES.—If an indictment, under that statute, be against a justice of the peace for not paying over fees, &c., on the first Monday of *August* of a certain year, it must aver that the fees were received by him *prior* to the first Monday of *August* of the preceding year.

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SAME—AFFIDAVIT.—And if the indictment, under said statute, be against the justice for not making an affidavit that he had no fees, &c., it should aver that no such fees came to his hands, &c.

ERROR to the *Vermillion* Circuit Court.

SULLIVAN, J.—Indictment for official negligence as a justice of the peace. The indictment contains two counts. The first count charges that the defendant being a justice of the [*91] *peace was, on the first Monday of *August*, 1841, possessed of certain fees belonging to certain witnesses, &c., which had not been demanded of him by said witnesses, &c., nor received by them on the first Monday of *August*, 1842, and that being so possessed of said fees, he did, on the said first Monday of *August*, 1842, and for ten days thereafter, unlawfully, &c., neglect and refuse to pay the same over to the school commissioner of the county of *Vermillion*, to the damage, &c. The second count charges the defendant with failing, neglecting and refusing to file with the auditor of said county on the first Monday of *August*, 1842, and within ten days thereafter, an affidavit that no fees belonging to any witness, &c., remained and was in the hands of the defendant, and which had been received by him prior to the first Monday of *August*, 1841, and not demanded or received by them, &c. The Circuit Court quashed both counts of the indictment, and the State prosecutes this writ of error.

The statute upon which this indictment is founded (Acts of 1842, p. 131), provides in the first section, that the clerks of the Circuit and Probate Courts, and all justices of the peace in this State, shall, on the first Monday in *August* in each year, or within ten day thereafter, pay over to the school commissioner of their respective counties, who shall receipt therefor, all such fees as may have come into their hands respectively, by virtue of their several offices, at any time prior to the preceding first Monday in *August*, for any witness, &c., which shall not have been duly demanded and received out of the hands of such officer by the person for whom the same may have been received. The second section directs the clerks and justices, within said ten days, to file with the auditor of the proper

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county the school commissioner's receipt, accompanied by a schedule of the fees paid over verified by oath, and then enacts that, in case such clerks or justices may have no fees in their hands on the first Monday in *August* liable to be paid over, they shall in like manner file an affidavit of that fact within the ten days aforesaid. The third section makes it indictable to fail, neglect, or refuse, to comply with the foregoing provisions of the statute.

[*92] *We do not perceive that there is any force in the objection to the indictment, that it is founded on an unconstitutional statute. The clerks and justices, while the fees remain in their hands, hold them in trust and for the use of the persons entitled to them. If the Legislature think proper to appoint another depository, the public treasury for example, or, as in this case, the school commissioner, by whom the fees shall be safely kept until demanded by the person entitled to them, it is competent for it to do so. No right or confidence is impaired by such legislation.

We are of opinion, however, that the first count of the indictment does not set out an indictable offense. The offense consists in failing, neglecting, or refusing, to pay to the school commissioner on the first Monday of *August* annually, or within ten days thereafter, any fees that may have come to the hands of the clerk or justice *prior* to the first Monday of *August* preceding the time fixed for the annual payment. If the fees were received *on* or subsequent to that day, the statute does not require that they should be paid over on the first Monday of *August* next succeeding. The charge in the indictment is, that *on* the first Monday of *August*, 1841, the defendant was possessed of certain fees, and that he failed to pay them over on the first Monday of *August*, 1842, or within ten days thereafter. An averment that he was possessed of fees *on* the day first named, is not an averment that he was possessed of them *prior* to that day.

The second count is also insufficient. It should have alleged that no such fees came to the hands of the defendant, for in that event only was he liable for not making an affidavit to

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that effect. It does not appear from the count, but that the defendant may have paid over to the school commissioner all the money in his hands which he was required by law to pay, and that he had filed his receipt with the auditor, accompanied by the proper schedule and affidavit. If he did so, he was guilty of no offense in not filing an affidavit that no fees had come to his hands. It is a general rule, that all indictments upon statutes must state all the circumstances which [*93] make up the definition of *the offense, so as to bring the defendant within it. 1 Chitt. C. L., 281. This has not been done in this case.

Per Curiam.—The judgment is affirmed.

J. P. Usher, for the State.

A. Kinney and *S. B. Gookins*, for the defendant.

TAYLOR v. THE STATE.

CRIMINAL LAW—REPEAL OF STATUTE.—A person indicted for an offense created by statute, can not be convicted after a repeal of the statute, unless the repealing statute contain a saving clause, &c.(a).

ERROR to the *Gibson* Circuit Court.

DEWEY, J.—At the *September* term, 1842, of the *Gibson* Circuit Court, *Taylor* was indicted for selling tea without license. At the *September* term, 1843, he was tried and found guilty of the offense.

The indictment was founded upon the fifty-fifth section of the act respecting crime and punishment, by which it was enacted that every person who should vend merchandise, not the product of the *United States*, without license, &c., should be fined, &c. R. S., 1838, p. 217. In *January*, 1843, the Legislature repealed “so much of the act entitled ‘An act relative to crime and punishment,’ &c., as requires a license or permit to vend coffee, tea, or sugar.” Laws of 1843, p. 82.

(a) *Gasper v. The State*, 11 Ind., 518; 2 Id., 75; Id., 659; 5 Id., 327.

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If this clause has any meaning at all, it is a repeal of the statute against vending foreign merchandise, so far as the enumerated articles are concerned; and as such repeal we view it. The defendant was, therefore, convicted after the repeal of the law creating the offense for which he was indicted: This was illegal. No principle is better settled, than that a conviction can not take place after the repeal of a violated law, unless the repealing act contain a provision for that purpose. Such is not the fact in the present case.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Pitcher, for the plaintiff.

J. Lockhart, for the State.

 [*94] *VANVACTER v. PATTERSON.

ASSIGNMENT OF NOTE—SET-OFF—EVIDENCE.—Suit against the maker of a sealed note for the payment of money, brought by *V.* as assignee of *M.*, who was assignee of *B.*, the payee. Plea of payment to the payee before notice of his assignment to *M.*, claiming as set-off's certain notes of *B.*, one of which was payable to the defendant, and the others were assigned to him. Replication, that the defendant had notice, &c.

Held, that the notes and assignments mentioned in the plea might be read in evidence by the defendant. *Held*, also, that evidence offered by the defendant, that *M.* transferred the note declared on to *W.* by a blank indorsement, that *W.*, without indorsing it, transferred it to *T.*, that the latter transferred it by delivery to *B.*, who in the same manner transferred it to the plaintiff, who, before the maturity of the note, filled up the blank indorsement to himself—was inadmissible under the issue.

ERROR to the *Union Circuit Court*.

DEWEY, J.—Debt by *Vanvacter* against *Patterson*. The action is founded on a sealed note made by the defendant to one *Bagnell* for \$200, dated *March* the 27th, 1838, payable in three years from *December* the 25th, 1838, and assigned by *Bagnell*, *March* the 15th, 1839, to one *Marsh*, and by him to the plaintiff. The defendant pleaded the statutory plea of payment to

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Bagnell before notice of the assignment by him to *Marsh*; and alleged, as matters of set-off three notes; one made by *Bagnell* to the defendant, *August* the 11th, 1840, for \$65.00, payable *December* the 25th of the same year; one made by *Bagnell* to one *Hanna*, *July* the 2d, 1840, for \$90.00, payable *December* the 25th, 1840, and assigned by *Hanna* to the defendant *May* the 27th, 1841; and another made by *Bagnell* to one *Brandenburgh*, *August* the 16th, 1840, for \$60.00, payable *December* the 25th, 1840, and assigned by *Brandenburgh* to the defendant *April* the 10th, 1841. The plaintiff replied that the defendant had notice of the assignment of the note mentioned in the declaration by *Bagnell*, as the assignment is therein alleged, before he received the notes described in the plea; conclusion to the country, and issue. The cause was submitted to the Court without a jury.

On the trial, the plaintiff produced the note and assignments set out in the declaration, and proved that *Marsh*, on the 15th of *March*, 1839, notified the defendant of the assignment by *Bagnell* to *Marsh*; and that the defendant then admitted [*95] that he held no set-off against the note. The defendant produced the notes and assignments described in his plea, to the admission of which in evidence the plaintiff objected, but they were admitted. The defendant was also permitted to prove, notwithstanding the objection of the plaintiff, that *Marsh*, the first assignee of the note declared on, transferred it to one *Wainright* by a blank indorsement; that *Wainright*, without indorsing it himself, transferred it to one *Tappen*, who transferred it by delivery to *Bagnell*, who, in the same manner, transferred it to the plaintiff, who, before the maturity of the note, filled up the blank over *Marsh's* name by an assignment to himself. The Court, after deducting certain credits which appeared upon the note produced by the defendant as matters of set-off, allowed the money due upon them in favour of the defendant, and rendered a judgment for the plaintiff for the difference between that amount and the sum due on the note which is the foundation of the action.

We do not think the Court committed any error in suffering

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the notes and their assignments mentioned in the plea to go in evidence. Their existence was admitted by the pleading; and it was proper they should be read. But it was erroneous to admit the parol evidence. The issue was, whether the defendant, before he acquired the matters of set-off, had notice of *Bagnell's* assignment of the note declared on to *Marsh*. The evidence was foreign to that issue, and should, therefore, have been excluded. To let in such evidence, the defendant should have framed his plea differently. He should have shown that *Bagnell*, after his assignment to *Marsh*, again became the legal owner of the note, and that the defendant held the matters of set-off during such second ownership, or that he acquired them without notice of *Bagnell's* second transfer. Such a plea would have conformed to the facts of the case, and would, under the statute regulating the assignment of notes not negotiable by the law-merchant, have barred the action, unless the plaintiff could have replied and proved notice to the defendant of *Bagnell's* assignment to the plaintiff, before the defendant procured the notes relied on as set-offs.

As the issue stands, it was supported by the plaintiff by his proof that the defendant had notice of *Bagnell's* [*96] assignment *to *Marsh*, before he procured any notes against *Bagnell*; and the judgment should have been in favour of the plaintiff for the full amount of the note declared on.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid, for the plaintiff.

J. S. Newman, for the defendant.

CLARK v. SPEARS and Another.

CHANCERY JURISDICTION.—The assignee of a note can not resort to a Court of chancery for relief against the assignor on account of the maker's insolvency, if there be no fraud in the assignment.

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SAME—PRACTICE.—If an answer in chancery be put in issue by a replication, no part of the answer can be read by the defendant as evidence in his favour, except so much as may qualify or explain the meaning of some passage in the answer read in evidence by the complainant.

SAME—EVIDENCE.—A bill of foreclosure and for a sale of mortgaged premises, averred that the mortgage was given to secure the payment of a certain promissory note. The answer admitted the execution of the note and mortgage, but alleged that judgment had been obtained on the note, and that the defendant had paid the judgment. A general replication was filed. *Held*, that the admission in the answer of the execution of the note and mortgage, was evidence against the defendant, but that the subsequent allegation of payment being a new and distinct fact, was not evidence in his favour.

ERROR to the *Tipppecanoe* Circuit Court.

BLACKFORD, J.—This was a bill of foreclosure and for a sale of mortgaged premises.

The bill states, that, on, &c., the defendants executed to the complainant two promissory notes, one for \$500 and the other for \$1,000, both payable in two years from the date; that to secure the payment of the notes, the defendants mortgaged to the complainant certain real estate; that after the notes became due, *Spears*, one of the defendants, paid the complainant \$500, and assigned him a note then due, executed by *Taylor* and *Taylor* and *Smith*, for \$500, for the note of \$1,000 secured by mortgage, and that the complainant thereupon gave up to *Spears* said note for \$1,000; that *Spears*, to induce the com-

plainant to take the note against *Taylor* and *Taylor* and *Smith*, falsely *and fraudulently represented the makers to be solvent and able to pay their debts, and that the complainant being ignorant of the circumstances of the makers, was induced by such false representations to take the note, the makers being wholly insolvent; that the complainant's assignee of the last named note obtained judgment on it against the makers at the first term after the assignment to the complainant; that execution issued on the judgment and was returned "no property found," and that the complainant paid the judgment and took back from his assignee the note on which the judgment had been obtained; that the note for \$500 executed to the complainant by the defendants and secured by

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mortgage, and also the note against *Taylor* and *Taylor* and *Smith*, remain unpaid; and that the complainant's estate in the premises has, therefore, become absolute, &c.

The answer of *Kinney*, one of the defendants, admits the execution of the notes and mortgage on which the bill is founded.

Spears, the other defendant, also admits in his answer the execution of the notes and mortgage; but he avers that he paid to the complainant the \$500, and assigned to him the note against *Taylor* and *Taylor* and *Smith*, mentioned in the bill, in satisfaction of the note for \$1,000; that the same was received by the complainant in full payment and satisfaction of the note for \$1,000; and that the complainant then delivered up to the defendant said note for \$1,000 as satisfied. This defendant says, that the note for \$500 executed by him and the other defendant, was assigned by the complainant to one *Mains*; that the assignee recovered judgment on that note; and that he, this defendant, paid off the judgment. This defendant denies that he knew, when he assigned to the complainant the note against *Taylor* and *Taylor* and *Smith*, that the makers were insolvent, or that he made the false and fraudulent representations respecting them charged in the bill. He admits that *Mains* obtained judgment on the note against *Taylor* and *Taylor* and *Smith*, but says he does not know whether the complainant paid the judgment to *Mains* or not.

The complainant filed a general replication.

[*98] *The cause was submitted upon bill, answers, and replication; and the Court dismissed the bill.

The first question in this case is, did *Spears* commit a fraud in his assignment to the complainant of the note of *Taylor* and *Taylor* and *Smith*? This question must be answered in the negative. The fraud in the assignment charged in the bill, is expressly denied in the answer of *Spears*, and there is no evidence on the subject. The assignment in question, therefore, not appearing to be fraudulent, a Court of chancery has no jurisdiction as to this part of the case. The \$500 in cash, and the note of *Taylor* and *Taylor* and *Smith*, were delivered to the

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complainant, and accepted by him in satisfaction of the note of \$1,000; and if the note of *Taylor* and *Taylor* and *Smith* could not be collected, the complainant's remedy, if he have any, is by a suit at law on the assignment.

The other question in the case is, is the complainant entitled to a decree on account of the note of \$500, which was given by the defendants to the complainant and secured by mortgage. The execution of the note and mortgage is admitted by the answers, but the answer of *Spears* is relied on to show that a judgment had been recovered on the note last named, and that he had paid the judgment. The answer being put in issue by the replication, no part of it could be read by the defendant as evidence in his favour, except so much as might qualify or explain the meaning of some passage in the answer read in evidence by the complainant. Here the answer admits the execution of the note and mortgage, and insists by way of avoidance on a distinct fact, viz., payment. The admission in such case is evidence against the defendant; but the subsequent allegation of payment being a new and distinct fact, is not evidence for him. *Gresley's Eq. Ex.*, 13; *Hart v. Ten Eyck*, 2 Johns. Ch. R., 62; *Wasson v. Gould*, 3 Blackf., 18.

This view of the case shows that the Circuit Court erred in dismissing the bill, and that the complainant was entitled, as the case was presented to the Court, to a decree as respects the note of \$500 given to him by the defendants.

[*99] **Per Curiam*.—The decree is reversed with costs.

Cause remanded, &c.

R. A. Chandler, for the plaintiff.

Z. Baird, for the defendants.

SHEARER v. THE STATE.

LIQUOR LAW.—On an indictment for selling spirituous liquors without license, the prosecutor need not prove that the defendant had no license.

ERROR to the Noble Circuit Court.

Shearer v. The State.

BLACKFORD, J.—This was an indictment against *Shearer* for selling spirituous liquors without license contrary to the statute. Plea, not guilty. Verdict and judgment for the State.

It was not proved on the trial that the defendant had no license to sell spirituous liquors; and the Court instructed the jury that such evidence, on the part of the State, was unnecessary.

There is no error in this charge. Whether the negative averment in the indictment, that the defendant had no license, was true or not, was a matter peculiarly within the knowledge of the defendant, and the *onus probandi* on the subject, therefore, lay upon him. This is one of the cases where a material averment in an indictment need not be proved by the prosecutor, on account of the great difficulty of proving it, when, if not true, it may be so easily disproved by the defendant. And this doctrine accords with the general rule, that the affirmative of any fact stated is to be proved. The opinion of the Circuit Court is sustained by many authorities. *Turner's case*, 5 Maule & Selw., 206; *Apothecaries' Company v. Bentley*, 1 Carr. & Payne, 538; Roscoe's Crim. Ev., 56; Arch. Crim. Plead., 98. In an information for selling ale without a license, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a license; the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment. It was said by *Abbott, C. J.*, that the party thus called on to answer for an offense against the [*100] excise laws, sustains not the *slightest inconvenience from the general rule, for he can immediately produce his license; whereas if the case is taken the other way, the informer is put to considerable inconvenience. *Harrison's case*, Paley on Convictions, 45, n., cited in Roscoe on Crim., Ev., 56. That case is in point; and so is *Gening v. The State*, 1 McCord, 573.

Per Curiam.—The judgment is affirmed with costs.

D. Wallace, for the plaintiff.

A. A. Hammond, for the State.

Walpole v. Cooper.

WALPOLE v. COOPER.

PRACTICE.—A plea, apparently good on its face, can not be set aside upon an affidavit that it is false.(a)

ERROR to the *Hancock* Circuit Court.

SULLIVAN, J.—Assumpsit by *Cooper*, assignee of *Preston* and *Meek*, against *Walpole* on a promissory note. Pleas, 1, Payment to the assignors before the assignment; 2, Payment of \$50 part, &c., to the assignors, &c.; 3, That the note was obtained from the defendant by the assignors by fraud, &c.; 4, Payment to the assignors in manner following, viz., that, at the time of the assignment, they were indebted to the defendant in the sum of \$175 for professional services, &c.; 5, That at the time of making said promissory note, the assignors agreed to receive from the defendant cash notes in satisfaction and discharge of the same, which he has always been ready to pay, &c.; 6, Non-assumpsit. The plaintiff, on affidavit filed stating that the pleas were false, vexatious and intended for delay, moved to set them aside. The defendant objected, but the Court set aside the pleas, and gave judgment for the plaintiff.

It is the duty of a Court, when a false plea is filed which is evidently intended to hinder, perplex and delay the case, to reject it on motion. This should be done to guard the administration of justice against mockery and abuse. In the performance of this duty, however, care should be taken that the Courts do not usurp the rights of another [*101] tribunal, by deciding upon the truth or falsity of matters of fact. There are cases reported, in which the Courts have set aside pleas apparently good upon their face, upon an affidavit that they were false and vexatious. The case of *Richley v. Proone*, 1 B. & C., 286, is of that kind. But those cases are discountenanced by later decisions, and the rule seems now to be, that if there be nothing improper on the

(a) *Beeson v. McConnaha*, 12 Ind., 420; 10 Id., 232.

The President and Trustees, &c., of Connersville v. Wadleigh.

face of the plea, and it be relevant, a motion to reject it on account of its falsity, or to sign judgment as for want of a plea, will be overruled. *Merrington v. Becket*, 2 B. & C., 81; *Smith et al. v. Backwell*, 4 Bing., 512; 1 Blackf., 347, note.(1) An application to reject a plea, founded on an affidavit that it is false, must, in general, be met by an affidavit of the defendant that the plea is true. The effect, therefore, of listening to such applications is to require pleas to be verified by affidavit, which, according to the statute, may be pleaded without oath.

Some of the pleas in this case are clearly defective, others are well pleaded. As the case must be reversed, we will leave the plaintiff to his demurrer to the defective pleas, and allow him to take issue on those well pleaded.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. Sweetser, for the plaintiff.

O. H. Smith, for the defendant.

HEASTON and Another v. FULGHUM, on Appeal.

IN an action against three persons founded on contract, a judgment against two of them only is erroneous, unless there be a return of "not found" as to the other, and a suggestion of the return entered of record. See *Lowe et al. v. Blair et al.*, 6 Blackf., 282; *Depew v. Wheelan et al.*, Id., 485; *Bell v. The State*, Ante, 33.

[*102] *THE PRESIDENT and TRUSTEES, &c., of CONNERSVILLE v. WADLEIGH.

FRAUD—WARRANTY.—In an action for the price of goods sold with a warranty, fraud in the sale is a good defense under the general issue, though there may have been no violation of the warranty.

The President and Trustees, &c., of Connersville v. Wadleigh.

SAME.—A willful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, is not fraud in law on the buyer, if the latter was not deceived or misled by the representation.

SAME.—A warranty that a fire engine sold and delivered would perform as well as any other in the western country, is not to be considered violated because the warranted engine is inferior to others in that country, much larger and more costly, if the inferiority be evident to a common observer.

NOTICE TO TAKE DEPOSITIONS.—If the defendant give notice that he will take depositions in another State, before a certain justice, at a specified time and place, and the plaintiff give notice that he will also take depositions before the same justice at the same time and place, and both parties attend and take depositions accordingly without objection, the defendant can not afterwards object in Court that the notice to him was insufficient; nor is the want of a *dedimus*, in such case, on the plaintiff's part, an objection to his depositions.

ERROR to the *Fayette* Circuit Court.

DEWEY, J.—Assumpsit by *Wadleigh* against The President and Trustees of *Connersville*. Two counts are upon promissory notes, expressed upon their face to be given by the defendants to the plaintiff for the price of a fire engine. There are also counts for a fire engine sold and delivered. Pleas, 1, General issue; 2, That the engine named in the several counts was warranted by the plaintiff to work and perform well, &c.; that it did not work well, &c., but was wholly useless and of no value; wherefore the consideration of the several promises had wholly failed, &c.; 3, Same as the second, except that the averment of no value is omitted; and an allegation of notice to the plaintiff of the insufficiency of the engine and of a request to take it away is added; 4, A plea very properly declared bad on general demurrer; 5, Same as the third, except that the warranty is more particularly set forth, and is shown to be in writing.

To the second, third, and fifth pleas, the plaintiff replied that the engine did work and perform well, &c. Issue upon the replication; verdict and judgment for the plaintiff.

The defendants prayed the Court to instruct the jury, that, if the plaintiff knowingly and falsely represented to

[*103] the defendants the engine in question to be "as good as a larger one then in use at *Oxford, Ohio*," such

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false representation was a fraud upon them, of which they had a right to avail themselves in their defense. The Court refused. There was evidence tending to show that the plaintiff had made the misrepresentation implied by the charge asked for.

It was competent for the defendants to set up, under the general issue, fraud in the sale of the engine, although there might have been an express warranty by the seller which was not violated by the fraudulent matter. *Stewart v. Coesvelt*, 1 C. & P., 23. But we do not think the Court erred in refusing to instruct the jury as requested. Whether the willful and false representation made by the plaintiff amounted to fraud, in contemplation of law, depended upon the circumstances under which it was made. Of these circumstances we know nothing, not even that the statement was made at the time of the sale; but supposing it was, there is nothing in the record to show that it had any influence on the defendants in making the contract. For aught that appears they might have been aware of its falsity; if so, it was not fraud in law; they were not deceived by it. Or the defendants might have been entirely ignorant of the capacity and qualities of the engine at *Oxford*; if such was the fact, a general statement that the machine they were about to purchase was as good as that engine, can hardly be supposed to have misled their judgment in respect to the power and quality of the subject of the contract. We certainly can not pronounce the Circuit Court wrong in refusing to instruct the jury that the misrepresentation, though willfully made, was in itself, and without reference to the other facts of the case, a fraud on the defendants.

One of the terms of the express warranty set out in the pleas, and proved on the trial, was, that the engine, sold by the plaintiff to the defendants, would "answer the purposes of a fire engine in all its uses, as well and effectually as any other engine in use in the western country." It appeared from the evidence that there were, in the western country, much larger and more costly engines, which were more effectual in extinguishing fires than the warranted machine. And the

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[*104] Court permitted the plaintiff to prove that the *inferiority of the latter engine (the cost of which was \$400) to those larger ones was plain and palpable to an ordinary observer; and instructed the jury, that if they found such inferiority was plain to common observation, and that the engine worked as well and effectually as any other engine of the same size, its inferiority to larger machines was no breach of the warranty. The defendants objected to the evidence and instruction.

The general principle is, that open, visible defects or qualities of goods sold and warranted are not reached by the warranty, though they are inconsistent with its terms; for the seller is not supposed to warrant against defects and qualities, whose existence is clear to the buyer and everybody else. 3 Black. Comm., 165; *Dyer v. Hargrave*, 10 Ves., 507. On this principle, we think the decision of the Circuit Court can be sustained. The authorities referred to show that the want of an ear to a horse, or of a roof to a house, is not a violation of a warranty that they were respectively perfect. We can easily conceive that the inferiority of a small and cheap fire engine to a large and costly one, is as palpable to a man of common sense as the absence of an ear to a horse or a roof to a house; and it is past belief that the plaintiff designed to warrant that such inferiority did not exist. The Circuit Court put the question of a breach of the warranty on the ground, that, if in point of fact it was plain and evident to a common observer that the engine in question was not equal in efficacy to certain larger engines, the inequality was no violation of the warranty; and, in our opinion, they put it on the true ground.

The defendants moved the Court to suppress two of the plaintiff's depositions. The facts were these: The defendants notified the plaintiff that they would take depositions before a certain justice, and at a time and place specified, in *Ohio*; and the plaintiff gave the defendants notice, that he would take depositions before the same justice and at the same time and place. The plaintiff took out no *dedimus*. The parties attended according to the mutual notices, and both took depo-

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sitions without objection: the defendants' depositions were read on the trial. The Court overruled the motion, and [*105] refused to suppress the plaintiff's depositions. *The objections to the depositions were, want of sufficient notice, and of a *dedimus* on the part of the plaintiff. The first objection is clearly groundless, because both parties attended at the taking of the depositions; and we think that, under the circumstances, the second should not prevail; a *dedimus* on the part of the plaintiff was waived by the acts of the parties.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, for the plaintiffs.

S. W. Parker and *C. H. Test*, for the defendant.

THE STATE BANK v. ENSMINGER.

USURY.—An action for money had and received lies to recover the excess of interest paid on a usurious contract. (a)

SAME.—In such suit against the State bank, the plaintiff proved that the bank had discounted several notes for him, and retained, under the name of exchange, a certain sum over and above legal interest; that the bank had discounted other notes for the plaintiff during several years, after those charged with exchange were payable; and that the plaintiff's bank account was balanced. *Held*, that it might be inferred that the notes charged with exchange were paid. *Held*, also, that the retaining said sum over and above legal interest, as exchange, was usury.

SAME — EVIDENCE.—The plaintiff in such suit offered in evidence a copy of so much of the discount book of the bank, as showed the usury complained of; the original not being produced on notice. The clerk of the bank, who had made the copy on the plaintiff's application, testified, that, having made it in a hurry, he could not be certain as to its accuracy. *Held*, that the copy was legal evidence.

SAME—PRACTICE.—The pleas in such suit were the general issue and the statute of limitations. After the trial was commenced, the cause, by consent, was withdrawn from the jury and submitted to the Court; the parties agreeing that the only issue should be, whether the defendant had received usurious interest from the plaintiff and how much. *Held*, that, by the agreement, the defendant had waived the plea of the statute of limitations.

(a) *Smeal v. Green*, 5 Ind., 308; 3 Id., 154.

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ERROR to to the *Tippecanoe* Circuit Court.

DEWEY, J.—*Ensminger* sued the State Bank in assumpsit for money had and received. Plea, general issue. There was also a plea of the statute of limitations, replication thereto, and issue. A jury having been called, and the plaintiff having made some progress in his testimony, it was agreed [*106] *by the parties to withdraw the cause from the jury and submit it to the Court, and that the only issue to be tried should be, whether the defendant had received usurious interest from the plaintiff, and how much. The cause was accordingly submitted to the Court, who found for the plaintiff and rendered judgment in his favour.

On the trial, the plaintiff proved that the Branch Bank at *LaFayette* kept a book, called the “discount book,” for its own use and convenience, which book contained a list of paper discounted by the Branch Bank, showing for whom discounted, the amount, the terms of the discount, when due, &c.; that the plaintiff had given the requisite notice to produce the book, and the refusal of the defendant to produce it; and that he had caused a clerk of the Branch Bank to copy so much of the book as contained the transactions of the plaintiff with the Branch Bank, and to deliver the copy to the plaintiff. The clerk who made the copy testified, that, having made it in a hurry, he could not be certain as to its accuracy. The plaintiff then offered the copy in evidence, and it was received against the defendant’s objection. The copy showed that the Branch Bank discounted for the plaintiff several notes, all payable in the town of *LaFayette*, and retained, under the name of exchange, over and above legal interest, a sum equal to the finding of the Court in favour of the plaintiff. It also showed that the Branch Bank had discounted for the plaintiff, during several years, other notes, after those charged with exchange were payable; and that the plaintiff’s bank account was balanced.

The object of the suit was to recover of the defendant the excess over legal interest, paid by the plaintiff on his bank trans.

It is urged by the defendant that an action for money had

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and received will not lie for money so paid. The general rule certainly is, that where money has been paid on an illegal contract, the parties being equally in fault, it can not be recovered back. But this doctrine is not applicable to contracts or transactions in violation of statutes, the object of which is to protect one class of the community from the oppression and exactions of another class, having, from their situation and condition, the power in a great measure to impose their own terms, however hard, upon those with whom they deal. The parties to a contract made under such circumstances are not *in pari delicto*. Hence it has been settled in *England*, that an action for money had and received will lie for the excess of interest paid on a usurious contract. Chitt. on Cont., 497; *Browning v. Morris*, Cowp., 790; *Smith v. Bromley*, 2 Dougl., 696, notes a, b; *Williams v. Hedley*, 8 East, 378. The same principle has been established in *New York* and *Massachusetts*. *Wheaton v. Hibbard*, 20 Johns., 290. A distinction has been attempted to be drawn between those cases and the one under consideration, because the statutes against usury in *England*, *New York*, and *Massachusetts* do not, like ours, punish the offense of taking usury by indictment. Those statutes, however, expressly prohibit the reception of more than the prescribed rate of interest, render a contract on which more is taken or reserved void, and inflict a penalty on the taker of usury recoverable in a *qui tam* action. These provisions render the contract illegal as much as if the penalty was enforced by indictment. Indeed, it is the prohibition to make a contract which renders it illegal, and not the punishment inflicted for a violation of the prohibition. But our statute discriminates between the criminality of the giver and the taker of usury, by inflicting a punishment only on the latter. An action for money had and received will lie to recover back money paid for usury.

It is also contended that there was no evidence that the defendant had received usury, because it was not expressly proved that the notes on which exchange had been charged and retained were ever paid. This objection is not sufficient

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to set aside the finding of the Court. The extract from the discount book showed, that the bank had discounted new notes for the plaintiff long after those on which exchange had been charged were payable. As the charter of the bank prohibits discounts to persons who are in arrear in their loans, it was fairly inferable that the last-named notes had been paid. Besides, there was evidence that the account of the plaintiff with the bank was balanced.

It is further objected that the Circuit Court erred in admitting in evidence the extract from the discount book. [*108] We do *not think so. Notice to produce the original had been given. Its production was refused. Had it been voluntarily produced, there can be no doubt of its having been legal evidence against the defendant. It contained evidence that the defendant claimed and received, in addition to legal interest, exchange on the discount of notes, when not the slightest pretence for exchange existed. This certainly constituted usury. As the plaintiff could not produce the original, a sworn copy was the best secondary evidence of its contents. The plaintiff applied to a clerk of the bank for a copy of the discount book so far as his own dealings with the bank were concerned; he obtained what was delivered to him as a copy, and proved by the clerk who made it, that it was designed to be a copy, but that owing to his hurry he could not swear positively to its accuracy. As the defendant, having possession of the original, alone possessed the means of detecting any incorrectness in the copy, and failed to do it, we think the copy was sufficiently authenticated to go in evidence.

The defendant contends for the benefit of the plea of the statute of limitations, but in our opinion without reason. The agreement under which the cause was withdrawn from the jury, and submitted to the Court, was a waiver of that plea.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

Z. Baird and R. C. Gregory, for the plaintiff.

D. Mace, for the defendant.

Gronour v. Daniels.

GRONOUR v. DANIELS.

TRESPASS—PLEADING.—A declaration in trespass for cutting down and carrying away the plaintiff's trees is good without an averment that the land where the trees were growing belonged to the plaintiff.

SAME—LICENSE.—A license, in such case, can not be given in evidence under the general issue, but must be specially pleaded.(a)

CHARGING JURY—PRACTICE.—If the Court charge the jury erroneously, but afterwards correct the mistake by giving a legal charge on the subject, there is no error.(b)

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of trespass brought by *Daniels* for cutting and carrying away certain trees [*109] *belonging to the plaintiff. Pleas, 1, Not guilty; 2, Tender of amends. There was also a third plea which was rightly adjudged bad on demurrer, and which the defendant admits can not be sustained. Replication in denial of the second plea. That plea should also have been demurred to, as it is obviously inadmissible. Such plea in trespass owes its origin to the statute of 21 *James* the 1st, 6 *Bac. Abr.*, 481, which is not in force here. Verdict and judgment for the plaintiff.

The defendant, in his brief, relies on three grounds to reverse the judgment. The first is, that the declaration is insufficient. The declaration is substantially as follows: For that the defendant, on, &c., at, &c., with force and arms, &c., cut down, prostrated, and destroyed the trees, to wit, twenty poplar trees, &c., of the said plaintiff, of great value, &c., then growing and being in and upon certain lands there situate, and took and carried away the same, &c. The declaration is objected to because the plaintiff's ownership of the land where the trees were standing is not shown; but the objection is not tenable. The suit being merely for cutting down and carrying away trees, it was only necessary to aver that the trees belonged to

(a) *Snowden v. Wilas*, 19 Ind., 10.(b) *Torr v. Torr*, 20 Ind., 118; 1 Id., 322; 7 Id., 123.

the plaintiff. The declaration agrees in form with the precedent in 2 Chitt. Plead., 869, and is unobjectionable.

The second objection to the judgment is, that the Court refused to permit the defendant to prove, under the general issue, that the trees were taken by the license of the plaintiff. To sustain this objection, the case of *Rasor v. Qualls*, 4 Blackf., 286, is relied on. That case decides, that, in trespass *quare clausum fregit*, the defendant may prove, under the general issue, that the freehold was in a third person, and that his entry was under the authority of the owner. There the evidence was in denial of the declaration that the defendant had trespassed on the plaintiff's close, and it was therefore admissible under the plea of not guilty. But the case before us is very different. Here the tendency of the evidence was not to show that the defendant had not cut down and carried away the plaintiff's trees, but to show that he was justified, by a license from the plaintiff, in committing the alleged trespass. Such a defense, it is well settled, must be specially pleaded.

1 Chitt. Plead., 544.

[*110] *The last objection made to the judgment is, that the Court charged the jury that the plaintiff had a right to recover for the injury done to his land. It must be noticed, however, that the Court afterwards distinctly informed the jury, on the defendant's application, that the measure of damages was the value of the trees destroyed. We think, therefore, that the defendant can not complain of this part of the case.

Per Curiam.—The judgment is affirmed, with six *per cent.* damages and costs.

W. H. Coombs and *R. Brackenridge*, for the plaintiff.

H. Cooper and *T. Johnson*, for the defendant.

BENNETT v. JONES and Another.

EXECUTION ON JUSTICE'S TRANSCRIPT.—*Scire facias* to have execution in the Circuit Court on a justice's transcript. The writ alleged the recovery of a judgment by the plaintiff against the defendant before a justice of the peace for a certain sum, the issuing of a *fiery facias* on the judgment, and a return of the execution *nulla bona*. It stated also that the justice afterwards filed in the Circuit Court a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that Court. *Held*, that the averment that the transcript had been recorded was immaterial; that a plea, therefore, denying that the transcript had been filed *and recorded* was bad; and that the plea should have denied only so much of the averment as states that the transcript had been filed. (a)

SAME—OFFICER'S RETURN.—The defendant can not, in such case, deny the truth of the constable's return of *nulla bona*.

SAME.—If the transcript of the justice in such case states, that the writ in the suit was returned by the constable as served on the defendant, that statement is, at all events, *prima facie* evidence of the due service of the writ.

ERROR to the *Union* Circuit Court.

BLACKFORD, J.—*Scire facias* by Jones and another against Bennett to have execution, in the Circuit Court, against real estate on a justice's transcript.

The writ alleges the recovery of a judgment by the plaintiffs against the defendant before a justice of the peace for a certain sum, the issuing of a *fiery facias* on the judgment, and the return of the execution *nulla bona*. It states also that the justice afterwards filed, in the Circuit Court, a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that Court.

[*111] *Pleas in bar as follows: 1, No such judgment as alleged; 2, No notice of the suit before the justice; 3, The justice's transcript was not filed and recorded in the Circuit Court; 4, No such transcript as alleged remains of record in the Circuit Court; 5, No execution was issued on the judgment; 6, No return of *nulla bona* to the execution; 7, The defendant had goods sufficient to satisfy the execution.

(a) *Powson v. Doe*, 1 Ind., 492.

Bennett v. Jones and Another.

The third, fourth, and seventh pleas were demurred to, and the demurrers sustained. To the other pleas, replications were filed in affirmance of the allegations denied by those pleas. The cause was submitted to the Court, and judgment rendered for the plaintiffs.

We think the third plea is bad. The execution having been issued by the justice, and returned *nulla bona*, before the filing of the transcript, as shown by the *scire facias*, it was not necessary to have the transcript recorded. R. S., 1838, p. 375. *Hamilton v. Matlock*, 5 Blackf., 421. The averment in the *scire facias*, therefore, that the transcript had been recorded, was an immaterial averment, and the plea should not have noticed it. The traverse of the averment that the transcript had been filed and recorded is too large; it should have been only of so much of the averment as states that the transcript had been filed.

The fourth plea is in denial of an immaterial averment, and the demurrer to it was correctly sustained.

The seventh plea is also bad. We have heretofore held that, in a suit like this, the truth of the constable's return can not be denied. *Hamilton v. Matlock*, *supra*.

The judgment on the merits is objected to on the ground that the justice's judgment was by default, and that there is no sufficient evidence that the defendant had notice of the suit. The answer to this objection is, that the transcript of the justice given in evidence expressly states, that the writ was returned by the constable as served on the defendant. That statement must be considered, at all events, *prima facie* evidence of the due service of the writ.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

J. B. Sleeth, for the plaintiff.

J. S. Reid, for the defendants.

Gregory v. Logan.

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*GREGORY v. LOGAN.

CONSIDERATION—PLEADING.—Debt on a sealed note. Pleas, 1, *Nil debet*; 2, That the note was given without any good or valuable consideration; 3, That the note was given by the defendant, who was the administrator of one A, deceased, to the plaintiff in consideration of a debt which A. at the time of his death, owed the plaintiff, and for no other consideration. Replication to the second plea, that the consideration had not failed in manner and form, &c. Held, that the first and third pleas were bad, and the replication good.

ERROR to the Warren Circuit Court.

SULLIVAN, J.—Debt by *Logan* against *Gregory* on a sealed note. Pleas, 1, *Nil debet*; 2, That the note was given without any good or valuable consideration; 3, That it was given by the defendant, who was the administrator of one *William Allen*, deceased, to the said *Logan* in consideration of a debt which *Allen*, at the time of his death, owed to *Logan*, and for no other consideration whatever; wherefore said writing obligatory is without consideration. The plaintiff replied to the second plea, that the consideration had not failed in manner and form, &c.; and filed general demurrers to the first and third pleas. The Court sustained the demurrers; and the issue on the second plea being, by consent of parties, submitted to the Court for trial, judgment was given for the plaintiff.

The demurrer to the first plea was correctly sustained. *Nil debet* can not be pleaded to an action of debt on a sealed instrument.

The demurrer to the third plea was also properly sustained. It is contended, that, according to the statute of frauds and perjuries, the consideration of the promise by *Gregory*, as well as the promise itself, should have been in writing; and that as the instrument on which the suit is brought does not express a consideration, the judgment of the Court, on the demurrer, should have been for the defendant. The writing sued on is an agreement under seal, and to such contracts the statute does not apply. In *England*, in all contracts intended to be em-

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braced by the statute, the consideration as well as the promise must be in writing, but it is there settled that contracts under seal are not embraced by it. In *New York*, where the [*113] *English* doctrine is followed, it is *decided that the statute does not apply to writings under seal. *Livingston v. Tremper*, 4 J. R., 416. The reason why the statute does not apply to contracts under seal is, that a seal, of itself, imports a consideration.(1) There is no validity therefore in the objection, that *Logan's* contract is not binding on him because no consideration is expressed for the promise; and as the plea sets up no bar to the plaintiff's action, the demurrer was correctly sustained.

It is also objected that there was no sufficient replication to the second plea. The replication is not formal, but this Court has heretofore held such a replication to be good on general demurrer. If it be so, it is also sufficient after verdict.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

R. C. Gregory, for the plaintiff.

R. A. Chandler, for the defendant.

(1) In consideration of a written promise of an executor or administrator to answer damages out of his own estate, or of any person to answer for the debt, default, or miscarriage of another, &c., need not be expressed in the writing. R. S., 1843, p. 589.

DORSEY v. HADLOCK and Others.

EQUITY JURISDICTION.—The assignee of a promissory note, not negotiable by the law-merchant, may maintain a suit in equity against a remote assignor.

SAME.—But a suit at law does not lie in such case.(a)

DUE DILIGENCE.—A *fi. fa.* issued on the 18th of *May* on a judgment which was recovered without delay, on the 25th of the preceding month, by an assignee against the maker of a note. All the defendant's property that could be found was levied on and sold, but the proceeds of the sale paid

(a) *Ewing v. Sills*, 1 Ind., 125.

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only a part of the debt. *Held*, that the diligence used was sufficient to charge a remote indorser, in equity, for the balance due on the note.(a)

APPEAL from the *Floyd* Circuit Court.

SULLIVAN, J.—This was a bill in chancery, filed by the plaintiff in error as the second indorsee of a promissory note, to recover a balance due upon it from *Hadlock* and *Woodworth* the first indorsers. The bill states that on the 3d of *April*, 1837, *Stephenson* and *Acheson* made their promissory [*114] *note for the sum of \$1,480.07, payable six months after date to *Hadlock* and *Woodworth*; that *Hadlock* and *Woodworth* indorsed it on the 29th of *May*, 1837, to *Greenbury Dorsey*, and the latter on the same day indorsed it to the complainant; that on the 9th of *October*, 1837, the note being unpaid, the complainant commenced a suit at law in the *Floyd* county Circuit Court against *Stephenson* and *Acheson*, who were residents of said county, for the recovery of the amount of said note; that a *capias ad respondendum* was issued returnable to the next term, which was duly served on *Acheson* ten days before the first day of the term, but in consequence of the absence of *Stephenson* from the State, it was not served upon him ten days before the first day of the term, and the cause was for that reason continued until the next term of the Court; that at the term next succeeding, a judgment was rendered in favour of the plaintiff against said *Stephenson* and *Acheson* for the amount of the note, and on the 18th of *May*, 1838, a *fiery facias* was issued, which was levied on certain real estate, being all the property that the sheriff could find belonging to the execution defendants, and part thereof was sold on the 21st of *July*, 1838, for the sum of \$558, and the residue being incumbered by mortgage, was subsequently sold by virtue of a *vend. exponas* for the sum of 62½ cents. *Hadlock* and *Woodworth* and *Greenbury Dorsey* are made defendants to the bill; and the prayer is, that the first indorsers may be decreed to pay to the complainant the balance due to her, &c. *Hadlock* and

(a) *Miller v. Deaver*, 30 Ind., 371; 3 Id., 296.

Woodworth demurred to the bill. The demurrer was sustained and the bill dismissed.

We understand the principle to be well settled, that the assignee of a bond, or of a note not negotiable by the law-merchant, can not maintain a suit at law against a remote indorser, because, as between them, there is no privity of contract. In the State of *Virginia*, from whence our statute regulating the negotiability of paper not mercantile in its character is derived, such is now, and has been for years, the settled law. 1 Blackf., 55; 1 Cranch, 290; 3 Id., 311. The remedy of the indorsee at law is against his immediate indorser only.

A Court of equity however, to prevent a multiplicity [*115] of suits, will in such cases entertain a bill, and render a decree in favour of the indorsee against an indorser ultimately liable however remote, provided legal diligence has been used by the indorsee to recover from the maker. *Riddle v. Mandeville*, 5 Cranch., 322; *Bank of U. S. v. Weisiger*, 2 Pet., 331. The indorser, it is said, is understood to pass to the indorsee every right, founded on the note, which he himself possesses. Among these is his right against the prior indorser. This right is founded on an implied contract which is not by law assignable. Yet if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note, and may of course be enforced in equity. *Riddle v. Mandeville*, *supra*, 2 Story's Eq., 497.

As the jurisdiction of a Court of chancery in the case under consideration can not be doubted, the question remains to be examined, whether the complainant has shown in her bill that she employed due diligence to collect the debt from the makers of the note. We think the statements in the bill do show that she has, with due diligence, pursued the makers as far as the law requires. A suit at law was brought within a few days after the note became due, and a judgment was obtained at the first term at which it could, by the laws of the land be obtained. The judgment was rendered at the *April* term of the Court, and on the 25th day of the month. When the term closed we are not informed. On the 18th of *May* execution

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was issued, and promptly laid on all the property of the defendants that could be found, as the bill alleges, which was sold without unnecessary delay. It was not necessary that the plaintiff should pursue the makers of the note further. A return of *nulla bona* to an execution, issued on a judgment in favour of an assignee against the maker of a note, is sufficient evidence, *prima facie*, of the insolvency of the maker, in an action by the assignee against the assignor. *Hanna v. Pegg*, 1 Blackf., 181. In this case the averment is, substantially, that the property levied on paid the sum of \$558.62½ part only of the debt, and that for the residue, no property whereon to levy could be found. It amounts to the averment of a return of *nulla bona* as to the debt now sought to be recovered.

We decide this case upon the allegations in the bill, [*116] which are admitted by the demurrer to be true. If the facts are not truly stated, or if the defendants can show that they have been prejudiced by the delay of the plaintiff, either in commencing suit against the makers of the note, or in issuing execution on the judgment obtained against them, the defendants will of course avail themselves of a proper defence in their answer to the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

R. Crawford, for the appellant.

J. Collins, for the appellee.

RICHARDSON and Wife v. HOPKINS.

SLANDER.—A declaration in slander alleged the words to have been spoken in a discourse with *A B*, in the presence and hearing of others. *Held*, that it was not necessary to prove that the words were addressed to *A B*.

ERROR to the Noble Circuit Court.

DEWEY, J.—Slander by *Richardson* and wife against *Hopkins* for words spoken of the wife. There are several counts

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in the declaration. Each count alleges the slander to have been uttered in a certain discourse had by the defendant with a particular person by name, and in the presence and hearing of divers other persons. Pleas, the general issue and the statute of limitations. Verdict and judgment for the defendant.

On the trial, the Court restricted the plaintiffs to proof of words addressed by the defendant to the persons, or some of them, with whom he was alleged to have held the discourse.

We do not consider the question here presented a very plain one. It was certainly unnecessary, and, as far as we know unprecedented, to allege in the declaration that the *colloquium* was had with a particular person by name. The pleader may, however, increase the burden of his proof by unnecessary averments; and we should be inclined to hold the plaintiffs to strict proof of the *colloquium* in each count, as they have seen fit to describe it, were there not authority, which we conceive to be analogous, against it. The law is well settled, [*117] that, where words are laid to have been spoken *in the presence of an individual named, and of others, the action may be maintained by proof of words uttered when that individual was not present. Bull. N. P., 6; Stark. Ev. iv. 844; Roscoe's Ev., 4th ed., 372. Our opinion therefore is, that the plaintiffs should have been permitted to prove the words laid in the declaration, though they were not addressed to any of the persons therein designated.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson and *D. Wallace*, for the plaintiffs.

HAYS and Wife v. MITCHELL and Wife.

SLANDER.—The words, "You hooked my geese," are not actionable in themselves.

SAME.—Words not actionable in themselves may express a criminal charge, by reason of their allusion to some extrinsic fact, or of their being used and

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understood in a different sense from their natural meaning, and thus become actionable.(a)

SAME—PLEADING.—An *innuendo* can not change the ordinary meaning of language.(b)

ERROR to the *Bartholomew* Circuit Court.

DEWEY, J.—Slander by *Mitchell* and wife against *Hays* and wife. Among the words laid in the declaration are the following: “You hooked my geese;” *innuendo*, that the wife of *Mitchell* had stolen defendant’s geese. Plea, general issue; verdict and judgment for the plaintiffs.

The Court charged the jury, in substance, that the above words were actionable in themselves, and, if proved, would sustain the action, unless it appeared from all the circumstances of the case they were spoken in an innocent sense.

We think this instruction was erroneous. The common and ordinary meaning of the word “hook” is not *steal*; nor does its connection with the rest of the sentence naturally give it that signification or any other criminal meaning. Words not actionable in themselves may express a criminal charge by reason of their allusion to some extrinsic fact, or in consequence of being used and understood in a particular sense different from their natural meaning, and thus become actionable. And when such is the case, it is as necessary [*118] to *prove the extrinsic fact, or the particular and offensive sense in which the words were used, as it is to establish the words themselves. The charge of the Court was a violation of this principle.

The declaration in this cause is not so framed as to make the words stated a good cause of action. Something more than an *innuendo* was necessary for that purpose. An *innuendo* can not aver a fact, or change the natural meaning of language. There should have been a prefatory allegation of some extrinsic matter, or an explanation of the particular and criminal meaning of the words. This introductory matter having been stated, the *colloquium* should have connected with it the speak-

(a) *Dodge v. Lacy*, 2 Ind., 212; 6 Id., 339; 17 Id., 245.

(b) *Ward v. Colghan*, 30 Ind., 395.

ing of the words complained of, leaving to the *innuendo* its proper office of giving to those words that construction which they bore in reference to the extrinsic fact, or explanation of their particular meaning. In slander for words not actionable in themselves, the inducement in the declaration showing their actionable character should, of course, conform to the truth of the facts. If a crime has really been committed, and the words sued for were spoken in reference to it, that matter should be averred. *Linville v. Earlywine*, 4 Blackf., 469. Or if the defendant has been in the practice of using the words to express the commission of a crime, that fact should be alleged. *Goldstein v. Foss et al.*, 4 Bing., 489; *Angle v. Alexander*, 7 Id., 119. Or if a word or phrase has a particular and criminal meaning different from its ordinary import, and was used in its opprobrious sense by the defendant, those facts should appear. *Forbes v. King*, 1 Dowl. P. C., 672; 2 Chitt. Pr., 549, n. y; *Day v. Robinson*, 1 Adol. & E., 554; 4 N. & M., 884. It is usual to state such and similar matters in a distinct allegation; but they may be incorporated into the *colloquium*. *Ricket et ux. v. Stanley*, 6 Blackf., 169.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Brown and *A. A. Hammond*, for the plaintiffs.

W. W. Wick and *H. H. Barbour*, for the defendants.

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*SMITH v. ADDLEMAN.

VENDOR AND PURCHASER—CONTRACT TO CONVEY.—*A* and *B*, agreed under seal that *A* should sell and convey certain real estate to *B*, for which the vendor was to receive a certain sum, &c., when there should be made to the purchaser a good and sufficient deed for the property. Held, that this contract meant that *A* himself should execute the deed. Held, also, that *B*'s subsequent consent by parol to accept a deed for the property executed by a third person, and *A*'s tender of such deed to *B*, did not authorize *A*, in case of non-payment, to sue *B*, on the original contract.(a)

(a) See *Mix v. Ellsworth*, 5 Ind., 517.

Smith v. Addleman.

ERROR to the *Wayne Circuit Court*.

BLACKFORD, J.—*William S. Addleman* brought an action of covenant against *Smith* upon the following writing obligatory:

“Know all men by these presents, that I, *William S. Addleman*, of, &c., am held and firmly bound unto *John Smith*, of, &c., in the sum, &c., to be paid to the said *John Smith*, &c. Sealed with my seal and dated this 1st of *Sept.*, 1841. Now, whereas the said *William S. Addleman* hath granted, bargained, and agreed to sell and convey unto the said *John Smith* a certain lot situate, &c., for which the said *Addleman* is to receive \$500 in bankable paper when there is made to said *Smith* a good and sufficient deed, also \$800 to be paid to said *Addleman* one year from the date of said deed, &c. In witness whereof, &c. *William S. Addleman*, [SEAL.] *John Smith*, [SEAL.]”

The declaration avers that the plaintiff caused to be made out, in due form of law, a good and sufficient deed in fee-simple to the defendant for the lot; that he tendered the same to him and demanded the \$500; that the defendant refused to pay, &c.

Plea, that the plaintiff had not tendered to the defendant a good and sufficient deed for the premises, &c.

The cause was submitted to the Court, and judgment rendered for the plaintiff for \$502.

On the trial, the plaintiff introduced the agreement on which the suit was founded. He also introduced a bond dated the 8th of *February*, 1839, executed by one *Blanchard* to *Benjamin W. Addleman*, conditioned for the obligor's making to the obligee a conveyance of said lot on payment of the purchase-money. There were indorsed on this title *bond two assignments, one from the obligee to the plaintiff, and the other from the plaintiff to the defendant. It was proved that the plaintiff and defendant had spoken to *Blanchard* to make a deed for the lot to the defendant, but that *Blanchard* then declined to do so until he should obtain legal advice on the subject. The plaintiff further proved that a conveyance of the lot, executed by *Blanchard* and his wife on the 8th of

September, 1842, had been tendered by the plaintiff to the defendant, and its acceptance refused.

This is, in substance, the evidence upon which the plaintiff relied; and we are of opinion that it is not sufficient to support the action.

The agreement on which the suit is founded states, that the plaintiff had agreed *to sell and convey* the lot to the defendant; for which the plaintiff was to receive \$500 when there should be made to the defendant a good and sufficient deed. We understand from this language of the agreement, that the plaintiff was himself to execute a conveyance of the lot to the defendant; and that, on the execution of such conveyance, the defendant was to pay, &c. The plaintiff can not recover upon the contract so understood, without having himself executed or offered to execute the conveyance. He relies on parol evidence of the defendant's subsequent consent to receive a conveyance from a third person for the lot, but that evidence is not sufficient for the plaintiff. The law is well settled that when by a sealed agreement a party, on his performance of a particular act, is to be paid a sum of money, he must perform or offer to perform that act before he can recover on the agreement. That the parties had subsequently agreed by parol, that the plaintiff should perform some other act in the place of the one stipulated in the sealed agreement, and that he had actually performed such other act, will not authorize a suit on the sealed agreement. A recovery under such circumstances would violate the maxim, that matters which are contracted for by deed, can not be dissolved except by deed. The following authorities support this doctrine: *Heard v. Wadham*, 1 East, 619; *Thompson v. Brown*, 7 Taunt., 656; *Sinard v. Patterson*, 3 Blackf., 353. According to these authorities, if the defendant had even accepted the deed tendered, he could not

[*121] have been *sued on the original contract, the plaintiff not having performed or offered to perform his part of it. The case of *Thompson v. Brown* was shortly this: The master of a ship agreed by deed with the owner of goods to receive a cargo at *Seville*, and deliver the same at *London* for a

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certain sum. The cargo was accordingly received on board at *Seville*, but the parties then, by a parol agreement, changed the port of delivery from *London* to *Liverpool*, and the cargo was accordingly delivered at the latter place. In a suit by the master for the freight on the original contract, the action was held not to lie, on the ground that the stipulation by deed could not be dissolved by parol. In *Heard v. Wadham*, a case similar to the one before us, Lord *Kenyon* said that it was impossible for the plaintiff to answer the objection made to his recovery on the covenant; that he had covenanted to do certain things which had not been done, but the other party had indulgently accepted something else in lieu of that which he might have insisted upon; that the parol agreement so substituted might be sufficient whereon to found an action of *assumpsit*; but that it could not be the foundation of an action upon a covenant under seal, whereby the parties had bound themselves to perform a different contract.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden, for the plaintiff.

J. S. Newman, for the defendant.

 JUSTICE and Another v. CHARLES.

USURY—PLEADING.—Two counts in debt. To the first, which was on a promissory note given in 1841, with interest at ten *per cent. per ann.*, the defendant pleaded, that, on, &c., he bought of one *B* a certain lot of ground for \$1,000, and executed to him therefor two notes of \$500 each, with interest at six *per cent. per ann.*, taking from *B* a bond conditioned for a conveyance for the lot on request; that *B* assigned the notes to the plaintiff, which, at the plaintiff's request, and not upon any valuable consideration, the defendant took up, and gave the note in said count mentioned, and another for ———; and that *B* had no title to the lot.

SAME.—To so much of the interest on the note described in the first count as exceeds six *per cent. per ann.*, the defendant pleaded that he executed

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[*122] two notes of \$500 each, at six *per cent. per ann.* interest, to one *B* for a certain lot of ground; that *B* assigned the notes to the plaintiff; and that, on, &c., in 1841, the defendant, at the plaintiff's request, and not upon any valuable consideration, took up said notes, and gave the note in said count mentioned, and another for ———; they being for the balance due on the assigned notes.

Held, that both said pleas were bad.(a)

SAME.—The second count was on a promissory note given in 1842, with interest at ten *per cent. per ann.* *Held*, on demurrer to this count, that so much of the second section of the act of 1838 regulating interest, as allowed more than six *per cent. per ann.*, was repealed by an act of 1842; that the note described in said count, which was given after such repeal, was usurious and void; and that the count was therefore bad.

ERROR to the Wayne Circuit Court.

BLACKFORD, J.—*Charles* brought an action of debt against *Justice* and another. The declaration contains two counts. The first count is on a promissory note executed on the 27th of *October*, 1841, for the payment to the plaintiff, one day after date, of the sum of \$250, with interest at the rate of ten *per cent. per annum*. The second count is on another promissory note, executed on the 2d of *February*, 1842, for the payment to the plaintiff, on demand, of \$530, with interest at the rate of ten *per cent. per annum*. To the first count there are three pleas: 1, That on, &c., the defendants bought of one *Baldwin* a certain lot of ground for \$1,000, and executed to him therefor two notes of \$500 each, with interest at six *per cent. per annum*, taking from *Baldwin* a bond conditioned for a conveyance for the lot on request; that *Baldwin* assigned the notes to the plaintiff, which, at the plaintiff's request, and not upon any valuable consideration, the defendants took up, and executed the note in said count mentioned, and another for ———; and that *Baldwin* had no title to the lot. The second plea, the defendants admit, can not be supported. The following is the third plea: To so much of the interest on the note described in the first count as exceeds six *per cent. per annum*, the defendants say that they executed two notes of \$500 each, at six *per cent. per annum* interest, to one *Baldwin*, for a certain lot

(a) *Bray v. Pearsall*, 12 Ind., 334; *Morrison v. Whitmore*, 27 Id., 418.

of ground; that *Baldwin* assigned the notes to the plaintiff and that on the 27th of *October*, 1841, the defendants, at the plaintiff's request, and not upon any valuable consideration, took up said notes, and executed the note *in the first count mentioned, and another for —; they constituting the balance due on the assigned notes.

The plaintiff demurred to these pleas, and the defendants demurred to the second count.

The demurrers to the pleas were sustained, and the demurrer to the second count was overruled. Judgment for the plaintiff for the amount due on the notes described in the two counts of the declaration.

The first plea, which relies on a want of consideration for the promise, is bad. It shows that in consideration of two notes, on one of which the first count is founded, the plaintiff gave up to the defendants the two notes assigned to him by *Baldwin*; and thus, if as the plea says, the notes given up were without consideration, the plaintiff relinquished a right of action against *Baldwin* on the assignment of the notes given up. That relinquishment was a sufficient consideration for the notes executed to the plaintiff. Besides, the plea does not show but that the notes given up were for a much larger sum than those for which they were exchanged. The third plea attempts to show a want of consideration for part of the promise. With respect to that plea it is only necessary to say, that it admits that the defendants were indebted to the plaintiff in a certain sum of money, and shows that the note in question, payable one day after date, was given in part payment of the debt. There was plainly, then, a full consideration for the note with the legal interest contracted for, on which the first count is founded.

The validity of the second count remains to be examined. That count shows that the note described in it, was for the payment of a certain sum with interest at the rate of ten *per cent. per annum*. The second section of the act of 1838, regulating the interest of money, authorized such contracts as the one we are now considering. In 1842, however, an act was

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passed containing a section as follows: "So much of the second section of the act entitled An act regulating the interest of money in the State of *Indiana*, approved *February 1, 1831*, as allows a higher rate of interest than six *per centum per annum*, be and the same is hereby repealed." There was no statutory provision, when that repealing section was passed, which allowed a higher rate of interest than six *per* [*124] **cent. per annum*, except the second section of the act of 1838 to which we have just referred; and the words, therefore, "Approved *February 1, 1831*," in the repealing section, are inconsistent with the other parts of that section. Those words were no doubt inserted in the repealing section by mistake, which probably occurred in copying the title of the printed act of 1838, containing the said second section, annexed to which title those words are inserted, although, in fact, that act was approved, not in 1831, but in 1838. The whole repealing section, leaving out the words "Approved *February 1, 1831*," correctly describes the second section of the act of 1838; and those words, being repugnant to the rest of the section which contains them, and inserted as we conceive by mistake, may be rejected. This is the only view of the repealing section of 1842, which can give effect to that section and to the obvious intention of the Legislature, and we adopt it, though it must be admitted that the question is not free from difficulty.

Considering so much of the second section of the act of 1838 respecting interest, as allows a higher rate of interest than six *per cent. per annum*, to be repealed by the act of 1842, it follows that the note described in the second count, which was executed after such repeal, was usurious and void as being a contract expressly prohibited by the act of 1838.

The illegality of the note in question is shown by the second count, and the demurrer to that count, therefore, should have been sustained.

According to this opinion of the case, the judgment, which was obtained in *September, 1843*, in favour of the plaintiff for the amount of both the notes sued on is erroneous.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Fay, for the plaintiffs.

J. S. Newman, for the defendant.

[*125] *UNDERHILL v. WILLIAMS and Others.

CONTRACT TO CONVEY—STATUTE OF FRAUDS.—A bill in chancery alleged the following facts: *A* purchased from a county agent a certain town-lot, paid the purchase-money except a small sum, received a title-bond, and was put into possession. The obligee sold the lot to *B*, *B* sold to *C*, *C* sold to *D*, *D* sold to *E* who made valuable improvements. *E* sold to *F*, who sold to the complainant. The title-bond remained with the obligee unassigned during the sales to *B*, &c., and at each of them, the purchase-money was paid, and the purchasers were respectively put into possession. The complainant, soon after his purchase, obtained from *F* an order on the obligee for an assignment of the bond, &c. The obligee acknowledged *F*'s right to control the assignment, but afterwards, at *F*'s request, assigned the bond to him.

Held, that the case was not within the statute of frauds, and that the bill was sufficient. *Held*, also, that the Court was competent to decree that *F* should assign the bond to the complainant, that the obligee should pay the county agent the part of the purchase-money due him, and that, on such payment, the agent should convey the lot to the complainant.

ERROR to the *Kosciusko* Circuit Court.

SULLIVAN, J.—Bill for specific performance. *J. R. Williams* purchased from the agent of the county of *Kosciusko* lot No. 73 in the town of *Warsaw*, paid all the purchase-money, except the sum of \$7, received a bond signed by the county agent for the conveyance of the title, and was put into possession of the lot. *J. R. Williams* subsequently sold to one *Blair*, *Blair* sold to *Nutt*, *Nutt* to *Pottinger*, *Pottinger* to *W. Williams* who made valuable improvements on the lot; *W. Williams* sold to one *Tibbetts* and *Tibbetts* to the complainant. At the sale by *J. R. Williams* to *Blair* the title-bond was not assigned, but at that sale, and all the sales subsequently made, the title-bond remained in the possession of *Williams* unassigned. At each of

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the several contracts above-mentioned the purchase-money was paid, and the purchasers respectively put into possession. The bill states that a short time after the purchase from *Tibbetts* by the complainant, the latter obtained from *Tibbetts* an order directed to *J. R. Williams*, requesting and authorizing him to assign the title bond to *Sylvester Underhill*, a minor son of the complainant, for the complainant's use; that the order was shown to *Williams* who acknowledged the right of *Tibbetts* to control the transfer of the title bond; but that afterwards, at the request of *Tibbetts*, he assigned the title-bond to [*126] him. *J. R. Williams, Blair, Nutt, Pottinger, W.*

Williams, Tibbetts, Sylvester Underhill and C. Sleeper, agent of the county of *Kosciusko*, are made defendants to the bill. The prayer of the bill is, that *Tibbetts* may be decreed to assign the title-bond to the complainant, that *J. R. Williams* be decreed to pay the agent of *Kosciusko* county the balance of the purchase-money yet due for the lot, and that the agent, on such payment being made, convey to the complainant. There was a demurrer to the bill, and the ground relied upon in support of the demurrer was, that the agreement sought to be enforced was void by the statute of frauds and perjuries. The demurrer was sustained, and the bill dismissed.

The statute of frauds and perjuries does not affect a parol contract for the sale of lands where the purchaser is put into possession, especially where the purchase-money has been paid and valuable improvements made on the land. Such a case is excepted from the operation of the statute for the reason, amongst others, that if the contract were not valid the purchaser would be made a trespasser, and as such be liable to answer for the rents and profits. A fraud would be practiced on him. *Moreland v. Lemasters*, 4 Blackf., 383.

By the terms of the contract between *Tibbetts* and the complainant, the latter was entitled to the title-bond from *J. R. Williams*. The procurement of the bond by *Tibbetts* after the contract, and in violation of it, was a fraud upon the complainant. *Tibbetts* holds the bond as the trustee of the complainant who has a right to the possession of it and it is competent for

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a Court of chancery to decree an assignment of it. The Court as it respects that point, therefore, should have entertained the bill.

The remedial powers of a Court of chancery are also competent, we think, to afford relief to the complainant against *J. R. Williams*. The complainant has paid the full value for the lot, but can not obtain a title until the balance due from *Williams* to the county agent is paid. *Williams* also has received full value for the lot. The complainant is not only without title in consequence of the default of *Williams*, but he may, by a suit at law, be deprived of the possession. Under such circumstances, *Williams* may not fold his arms and stand still while his assignee, though a remote one, [*127] *suffers or is in danger of suffering. He is under a legal obligation to remove every obstacle out of the way of obtaining a clear title to the lot, and the right to enforce that obligation inures, in equity, to his assignee. It is the peculiar province of a Court of chancery, in matters complicated and various, to bring all the parties interested before it, and to make such decree, affecting each of the parties, as the ends of justice require.

Upon the whole case, therefore, we are of opinion that it was competent for the Court to decree that *Tibbetts* should assign the title-bond to the complainant; that *Williams* should pay the balance of the purchase-money to the county agent; and that upon such payment being made, the agent should convey to the complainant.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

J. W. Chapman and *A. L. Osborn*, for the defendants.

The State, on the Relation of Bird, v. Hood and Another.

THE STATE, on the Relation of BIRD, v. HOOD and Another.

PRACTICE.—In debt there was two issues in fact, one was immaterial, the other was valid and on a plea in bar of the whole cause of action. Verdict for the defendant. *Held*, that the immateriality of one of the issues was no cause for setting aside the verdict.(a)

EXECUTOR'S BOND, LIABILITY OF SURETY.—An executor's bond was conditioned, that if A should well, &c., perform his duties, &c., as executor of B, deceased, then the bond to be void, &c. *Held*, that the surety in the bond was not liable for any previous acts of the executor.

APPEAL from the *Huntington* Circuit Court.

SULLIVAN, J.—Debt by the plaintiff against the defendants on the bond of an executrix suggesting a devastavit. The defendants pleaded three pleas. The first was *plene administravit*, and the second was that the bond was delivered by the defendants to one *Williamson Wright* as an escrow. The plaintiff replied to those pleas, and the issues were tried by a jury. Verdict and judgment for the defendants. The third plea was demurred to by the plaintiff and the demurrer sustained.

No question therefore arises on that plea, and it is [*128] *not necessary to notice it. After the return of the verdict, the plaintiff moved to set it aside and award a repleader on account of the immateriality of the issues, which motion the Court overruled. A motion to enter a judgment *non obstante veredicto* was also overruled.

The Court did not err in overruling the motions of the plaintiff. If it be admitted that the issue on the first plea was immaterial, the second plea, which was in bar of the whole action, was good. The evidence is not spread upon the record, and it may have been upon the latter issue that the verdict was found for the defendants.

Upon the trial of the cause, the plaintiff moved the Court to give the following instruction to the jury, which was refused, viz.: That if it be proved that *Britton* the first surety on the bond of the executrix was exonerated, and *Ewing* signed a new

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bond as her surety, he, *Ewing*, became liable on the new bond for all previous acts done by her as such executrix. There is no evidence upon the record, either in the condition of the bond or otherwise, to show us under what circumstances the bond was given. The inquiry suggested by the instruction asked is, whether *Ewing*, the surety, is liable for all acts done by Mrs. *Hood*, the executrix, previously to his signing the bond, or whether his liability commences at that time. We have a statute which authorizes the surety of an executor, administrator, or guardian, if he wishes to discharge himself from liability, to go before the Court by whom his bond had been approved, and make application to be discharged; and the Court to whom the application is made, may require the principal to execute a further bond *for the performance of the condition of the former bond*, with such additional security as may be approved, &c. R. S., 1838, pp. 423, 4. The condition of the bond on which this suit is brought is as follows, viz., "The condition of the above obligation is, that if the said *Sophia C. Hood* shall well and truly and faithfully perform the duties and trusts committed to her as executrix of the estate of *William N. Hood*, late of *Miami* county, deceased, then said bond to be void, otherwise to remain absolute." The law is settled, that a surety can not be made liable beyond his undertaking.

Here the undertaking of the surety was altogether [*129] prospective. It had *no reference to the past acts of the executrix, if there were any such acts. If there had been proceedings under the statute above recited, and the condition of the bond had been according to the statute, there would have been more appropriateness in the instruction asked; but as there is no undertaking by the surety in respect to the past acts of the executrix, the Court did right to refuse the instruction.

Per Curiam.—The judgment is affirmed at the costs of the relator.

H. Cooper, for the appellant.

R. Brackenridge, for the appellees.

 Davis and Others v. Crow.

JACKSON v. GOODTITLE, on the Demise of BROMLEY, in Error.

THE copy of a declaration in ejectment, with a notice requiring an appearance at the term next after that which followed the time when the notice issued, was served on the tenant in possession. *Held*, that the notice was illegal.

Judgment in such action can not be rendered against the casual ejector, until after the tenant in possession has made default. R. S., 1838, p. 260.

DAVIS and Others v. CROW.

REPLEVIN-BOND—PLEADING.—In an action on a replevin-bond, a plea that the property replevied belongs to the plaintiff in replevin is bad.

SAME.—A replication in such suit assigned as a breach of the condition of the bond, that the plaintiff in replevin did not without delay prosecute the action of replevin, but suffered a nonsuit therein, as appeared by the record, &c. *Held*, that a rejoinder of *nul tiel record* to the replication should conclude to the Court.

SAME—FEES.—In an action on such bond, the plaintiff can not recover the fees paid to his lawyer in the replevin-suit, nor compensation for his own attendance at Court in that suit, nor his lawyer's fees paid in the suit on the bond.(a)

SAME—KEEPING PROPERTY LEVIED ON.—A constable seized some horses of A on an execution against him, and delivered them to B to be kept. A, without satisfying the execution, tendered to B the amount of the expense of keeping the horses, and demanded them. B having refused to
 [*130] deliver the horses, A replevied them, and afterwards suffered a nonsuit in the action of replevin. *Held*, in a suit by B against A and his sureties on the replevin-bond, that the plaintiff was entitled to recover in damages a reasonable charge for the keep of the horses, and that he was not bound to receive the money tendered.

ERROR to the Warren Circuit Court.

DEWEY, J.—*Crow*, assignee of the sheriff of Warren county,

(a) *Miller v. Hays*, 26 Ind., 380.

Davis and Others v. Crow.

sued *Davis* and his sureties in debt for the penalty of a replevin-bond, given in an action of replevin in which *Davis* was plaintiff and *Crow* defendant. The defendants craved *oyer* of the bond and condition, and spread them upon the record. The condition was in the usual form, for the prosecution of the action of replevin with effect without delay, and for a return of the property replevied should a return be awarded. The defendants pleaded three pleas: 1st, Covenants performed generally; 2d, Payment of the penalty of the bond; and, 3d, That the property replevied belonged to *Davis*, the plaintiff in the replevin. The plaintiff replied to the first plea, denying performance of the covenants, and assigned for a breach of the condition of the bond, that *Davis* did not prosecute the action of replevin with effect without delay, but that, at a certain term of the Circuit Court, he suffered a nonsuit therein, as appeared of record, &c. Replication in denial of the plea of payment. Demurrer to the third plea. The defendants rejoined *nul tiel record* to the replication assigning the breach of the bond, and concluded to the country. Special demurrer to the rejoinder, assigning for cause that it concluded to the country instead of the Court. The demurrers to the rejoinder and to the third plea were sustained. The issue on the second plea was tried by a jury. Verdict and judgment for the plaintiff.

On the trial, the plaintiff was allowed to prove, for the purpose of increasing the damages, \$15.00 paid by him for lawyers' fees, and \$9.00 for his own attendance at Court, in the replevin-suit, and \$15.00 more for lawyers' fees in this action. And it having been proved that the property replevied, consisting principally of horses, had been taken on execution against *Davis*, and placed by the constable who took it, in the hands of the plaintiff to be taken care of, from whose possession it was replevied, he was allowed to give in [*131] evidence a claim to \$3.00 for the keep of the *horses, and for his trouble in taking care of the property. The defendants objected to all this evidence. The defendants offered to prove that, while the property was in the hands of

the plaintiff, as the bailee of the constable, and before the execution was satisfied, *Davis* tendered to the plaintiff \$3.00 for keeping the horses and for his trouble about the property, which he refused to receive. This testimony being objected to was excluded.

We think the two demurrers were correctly sustained. The third plea, that the property belonged to the plaintiff in replevin, was no answer to the action for the penalty of the bond, nor did it meet the breach of the condition subsequently assigned, that the plaintiff in replevin failed to prosecute his suit with effect, &c. *Sherry et al. v. Foresman et al.*, 6 Blackf., 56. And the rejoinder of *nul tiel record* was faulty in concluding to the country. It should have concluded to the Court.

The decision of the Circuit Court, in allowing the plaintiff to give in evidence the amount of his lawyers' fees, and of his claim for compensation for attending Court in the action of replevin, is attempted to be justified by the statute regulating proceedings in replevin. That act provides that, when the replevin-bond is forfeited, the defendant, in an action upon it, "shall recover such sum as shall be just and equitable; and if the plaintiff (in replevin) shall recover, he shall in like manner recover damages for the detention of the goods and chattels." R. S., 1838, p. 476. We do not think the statute justified the admission of the evidence. It is certain that the plaintiff in replevin, had he been successful, could not have recovered in damages the amount of his lawyers' fees, nor compensation for his own attendance on Court; and we do not see the justice or equity of allowing the defendant in replevin to recover such damages, when they are forbidden to his adversary. There is still less pretense for including the expense of employing counsel in this cause in the damage for a breach of the bond.

But the claim for taking care of the replevied property stands on different ground. That claim constituted a part of the cost of the execution on which the property was taken.

The execution-debtor, *Davis*, had no right to the possession *of the property until this cost was paid and

Blair and Another v. Williams.

the execution satisfied. He replevied the property, therefore, wrongfully from the possession of the plaintiff who held it as the bailee of the constable. We think he was entitled to reasonable compensation for keeping the horses and taking care of the property; and that his charge for so doing constituted a proper item of the damages for a breach of the condition of the replevin-bond.

There was no error in rejecting the evidence that *Davis* tendered to the plaintiff the amount of his charge for keeping and taking care of the property. At the time the tender was made, *Davis* had no right to make it; the execution under which the property was retained by the plaintiff as the bailee of the constable was then unsatisfied. The bailment was not terminated, and the plaintiff was bound neither to receive the tender, nor to give up possession of the property.

There was an informality in swearing the jury. They were sworn only to try the issue of payment; they should also have been sworn to inquire of the damages occasioned by the assigned breach of the bond. But as no objection was made to the jury assessing damages, the objection was perhaps waived.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler, for the plaintiffs.

D. Mace, for the defendant.

BLAIR and Another v. WILLIAMS.

ASSIGNMENT—PAROL EVIDENCE.—Suit on a written promise by the defendant to assign to the plaintiff a note on a third person. *Held*, that parol evidence tending to show that the assignment was to be without recourse, was inadmissible.(a)

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought

(a) *Campbell v. Robbins*, 29 Ind., 271; 10 Id., 187.

by the plaintiffs in error. The declaration contains several counts, to which several pleas were filed. The pleadings may be considered, however, so far as the question we are to decide is concerned, as consisting of a declaration on a [*133] *written promise, and of the plea of non assumpsit.

The following is the written promise relied on: "For value received, I promise to assign a note of hand I hold on *Harrison T. Jones*, made payable to me, and worth on the face of it, on the 25th of this month, \$220 lawful money of the State of *Indiana*, unto *J. and P. R. Blair of Greensburgh, Indiana*, sometime in the month of *January*, 1841. *December 26th*, 1840. *Samuel Williams*."

Verdict for the plaintiffs for one cent, and judgment on the verdict.

On the trial, the defendant offered parol evidence tending to prove that the note which he had agreed to assign was to be assigned without recourse on him; which evidence though objected to was admitted.

We think the Court erred in admitting this evidence. The defendant's contract must be understood to be, that he would assign the note in the ordinary form; and the legal effect of such an assignment is, that if the money can not be collected, by due diligence, from the maker of the note, the assignee may look to the assignor for payment. The evidence in question tended to show that the assignment was not to be in the ordinary form, and was not to have the legal effect of an ordinary assignment. It therefore tended to vary the written contract of the defendant, and was inadmissible. *Odam v. Beard*, 1 Blackf., 191; *Wilson v. Black*, 6 Blackf., 509.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. H. Dunn, for the plaintiffs.

W. W. Wick and *L. Barbour*, for the defendant.

The State Bank v. Slaughter, Administrator

THE STATE BANK v. SLAUGHTER, Administrator.

NOTICE OF NON-PAYMENT.—A promissory note was payable to two persons not partners, and indorsed by them. *Held*, that notice by the holder of the maker's non-payment should be given to each of the indorsers.(a)

APPEAL from the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of *assumpsit* brought by the administrator of *Chamberlain* against the State [134] Bank, for *certain dividends on bank stock belonging to the intestate's estate. Plea, *non assumpsit*. The cause was submitted to the Court, and judgment rendered for the plaintiff.

On the trial, the defendant's possession of the dividends was admitted; and the defense was, that the intestate's estate was indebted to the defendant, and that the latter therefore was not liable, by a provision of the bank charter, to pay the dividends, whilst that indebtedness of the estate continued.

To prove the alleged debt to the bank, the following promissory note and indorsements were introduced: “\$200. *Lafayette, Ind.*, Sept. 11, 1839. Ninety days after date, I promise to pay to *Edward Barroll* and *John C. Chamberlin* or order \$200, negotiable and payable at the branch at *Lafayette* of the State Bank of *Indiana*, for value received. *James White*. Credit the drawer. *E. Barroll*.” (Indorsed) “Pay the State Bank of *Indiana*. *Edward Barroll*. *J. C. Chamberlin*.” The maker's non-payment of this note, and due notice of the default to the plaintiff, (*Chamberlin* being dead,) were also proved. *Barroll*, the other indorser, resided at *Lafayette* where the default occurred, and had there a place of business. The only notice for him of the maker's default was deposited in the post office at *Lafayette*, which was not a legal notice. *Curtis v. The State Bank*, 6 Blackf., 312; Story on Bills, 451.

We are of opinion that, according to these facts, the bank had no claim against the plaintiff. The note was payable to

a) *Dickerson v. Turner*, 12 Ind., 223.

 Reed v. Sering and Another.

two persons not partners, each of whom had indorsed it. The contract created by the indorsement being joint only, the indorsers, if liable at all, could be only jointly liable; and to render them so liable, the notice of the non-payment should have been given to them both. The following is the language of Justice *Story* as to bills of exchange: "Where there are several persons, who are joint drawers or indorsers, entitled to notice, who are not partners, each is entitled to notice, and, therefore, notice should be directed to his own proper domicile or place of business. Where they are partners, notice to either of the partners will suffice, at the domicile of either of them, or at their usual place of business." *Story on Bills*, 335.

[*135] The law as to notice to joint indorsers *must be the same, whether the indorsement be of a promissory note or bill of exchange; and the indorsers in the present case, therefore, according to the authority cited, were discharged for want of legal notice to each of them.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

A. Ingram, for the appellant.

J. Pettit and *S. A. Huff*, for the appellee.

REED v. SERING and Another.

JURISDICTION OF SUPREME COURT.—The Supreme Court has no jurisdiction in any case commenced before a justice of the peace, where the amount in controversy in the Supreme Court, exclusive of interest and costs, is less than \$20.(a)

ERROR to the *Marshall Circuit Court*.

SULLIVAN, J.—Trial of the right of property. The claimant represented himself to be the owner of a bay mare, a cooking stove, a bureau, a table, &c., which had been seized on an execution in favour of the defendants against one *Crum*.

(a) *Little v. The Danville, &c. Co.*, 18 Ind., 86.

Mullikin and Another v. Latchem.

On the trial in the Circuit Court, the cooking stove was found to belong to *Crum* the execution-defendant, and was valued at \$18; the residue of the property, valued at \$74, was decided to belong to the claimant.

Various errors are assigned, but we have not examined them as we are of opinion that this Court has not jurisdiction of the case. The claimant has obtained all he sued for except the cooking stove, the value of which is \$18. The defendants do not complain of the judgment of the Circuit Court. The stove, therefore, is the only article of the property claimed in controversy. This Court has not jurisdiction in any case commenced before a justice of the peace, where the amount in controversy, exclusive of interest and costs, is under the sum of \$20. And it is the amount that is in controversy between the parties in this Court, that settles its jurisdiction. *Tripp v. Elliott*, 5 Blackf., 168. As it is manifest that the amount in [*136] controversy is not sufficient *to confer jurisdiction upon this Court, the writ of error must be dismissed.

Per Curiam.—The writ of error is dismissed.

J. W. Chapman, for the plaintiff.

J. G. Marshall, for the defendants.

MULLIKIN and Another v. LATCHEM.

PATENT RIGHT.—Covenant on a sealed note brought by an assignee against the maker. Pleas, 1, Failure of consideration, without showing what the consideration was, and how it had failed; 3, That the note was given in part consideration of a deed made by the payee of the note, by which he sold the defendant the exclusive right of making, &c., an alleged new and useful improvement in the machine for steaming and renovating feathers, for which a patent had been granted, &c.; that the payee of the note, had no authority to sell, &c., because the assignment of the patent to him by the assignee of the patentee had not been recorded, &c.; 4, That the payee of the note warranted that said machine would greatly improve old feathers, &c., when in truth it does not improve them, &c.; 5, The same as the 4th, with the additional averment that the payee of the note knew that the machine would not improve old feathers, &c., and that by means of said

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false representations the defendant was induced to purchase the machine. Held, that the 1st, 4th, and 5th pleas were bad, and that the 3d was good.(a)

ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—This was an action of covenant by *Latchem*, assignee of *Cummins*, *Wright*, and *Cole*, against the plaintiffs in error on an instrument of writing under seal for the payment of \$106 in current bank paper. The pleas were, 1, Failure of consideration; 2, That the writing obligatory in the declaration mentioned, was executed by defendants in part consideration of a certain deed made by *Cummins*, *Wright*, and *Cole*, by which they granted, sold, and conveyed to the defendants, their heirs, &c., the exclusive right of making, using, and vending to others to be used within the counties of *Jay*, &c., in the State of *Indiana*, an alleged new and useful improvement in the machine for steaming and renovating feathers, for which letters patent had before that time been granted by the *United States* to *B.* and *A. Todd*, and for no other consideration whatever; that said *Cummins*, *Wright*, and *Cole*, had no authority to make or use said improvement, [*137] *or vend the same to others to be used, &c., wherefore, &c. The third plea avers the consideration of the instrument of writing sued on to be as stated in the second plea, and alleges that at the time of said sale, *Cummins*, *Wright*, and *Cole*, had no authority to sell, &c., because the assignment of the patent for said improvement to *Cummins*, *Wright*, and *Cole* by *Bailey*, the assignee of the patentee, had not been recorded in the office of the Secretary of State of the *United States*. The defendants pleaded, fourthly, that before and at the time of the sale of said patent right, the assignors of the plaintiff warranted that said machine would greatly improve old feathers and make them as good as new when renovated by it, when in truth it does not improve them, nor make them as good as new, &c.; 5, The same facts stated as in the fourth plea, with the additional averment that the plaintiff's assignors

(a) *Loce v. Oldham*, 22 Ind., 52, and cases there cited.

well knew that said machine would not improve old feathers and make them as good as new, and that by means of said false representations, the said *Mullikin et al.* were induced to purchase said machine. To the second plea the plaintiff replied that *Cummins, Wright, and Cole*, had authority to make and use said improvement, and to vend the same to others to be used, &c., and filed general demurrers to the first, third, fourth, and fifth pleas. The Court sustained the demurrers, and the issue on the second plea was, by consent of parties, tried by the Court, and judgment given for the plaintiff.

The demurrers to the first, fourth, and fifth pleas were correctly sustained. The first plea was deficient in not showing what the consideration of the contract was, and how it had failed. A plea of the failure of consideration should do both.

The fourth and fifth pleas did not present a bar to the whole action. The matter set up in those pleas would be available, under a proper issue, in mitigation of damages, but to constitute a defense to the suit, it should have been averred in addition to the matter stated, that the property for which the note was given was of no value, or that it had been returned or tendered to the vendor. This point was decided by this Court in *Howard v. Cadwalader*, 5 Blackf., 225; *Vide*, also, *Wynn v. Hiday*, 2 Blackf., 123, and note.

The Court erred in sustaining the demurrer to the [*138] third *plea. That plea states that the assignment of the patent right from *Bailey*, who was the assignee of the original inventors, to *Cummins, Wright, and Cole*, had not been recorded in the office of the Secretary of State of the *United States*. We have decided that the act of Congress of *February 21, 1793*, requires an assignment by the patentee to be recorded in the Secretary's office to give validity to the title of the assignee. *Higgins v. Strong et al.*, 4 Blackf., 182. The act also requires each successive assignment to be so recorded to give validity to the title of subsequent purchasers. Unless, therefore, the assignment to *Cummins, Wright, and Cole*, from *Bailey*, who was the assignee of the patentee, be recorded, the former acquired no right to the thing sold, and can transfer

The State, on the Relation of *Likens*, v. *Westbrook* and Others.

none. For these reasons we are of opinion that the third plea was sufficient to bar the action.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Fay and *J. S. Newman*, for the plaintiffs.

C. H. Test, for the defendant.

THE STATE, on the Relation of *LIKENS* v. *WESTBROOK* and Others.

JURISDICTION OF JUSTICE.—An execution issued by a justice of the peace, reciting a judgment for \$102.36, without showing how much of the judgment was for the debt, and how much for interest thereon, was held not to be void.(a)

SAME.—It will be presumed that the justice, in rendering such judgment, was acting within his jurisdiction.

ERROR to the *Harrison* Circuit Court.

DEWEY, J.—This was an action of debt in the name of the State, on the relation of *Likens*, against *Westbrook*, a constable, and his sureties, on his official bond. The condition of the bond is in the usual form, for the faithful discharge of the duties of the constable, &c. Three breaches are assigned. The first alleges, that the relator recovered a judgment before a justice of the peace, against one *Asa Buckles*, on the 16th day of *July*, 1841, “for the sum of \$95.86 debt, \$4.66 [*139] interest, and \$1.84 original *costs, making in all the sum of \$102.36, with interest from the date of the judgment, together with costs of suit;” that on the 18th day of *May*, 1842, the relator caused an execution to issue on the judgment, returnable in one hundred and twenty days, which execution, after reciting that the relator, on the 16th day of *May*, 1841, obtained judgment against *Buckles*, before the justice, “for \$102.36, with interest from the 16th day of *July*,

(a) See *The Inhabitants, &c., v. Weir*, 9 Ind., 224.

The State, on the Relation of Likens, v. Westbrook and Others.

1841, until paid, together with costs of suit," commanded the constable, *Westbrook*, that of the goods, &c., of *Buckles*, he cause to be made "the said debt, interest, and costs," &c.; that the execution was placed in the hands of *Westbrook*; that on the 27th day of *August*, 1842, he levied it on certain property; that, on the 16th day of *September* following, he returned the execution to the justice, stating in his return (which had no date) that he had levied on the property, but had not offered it for sale for want of time; that the return was false in this, that the constable had sufficient time to sell, inasmuch as twenty days remained between the time of seizing the property, and the return day of the execution; and that the judgment remained in full force, &c. The second breach is for failing to take property on the execution, although it was known to the constable that the execution-debtor had sufficient to satisfy the execution within the bailiwick of the constable. The third breach is for failing to return the execution.

The defendants demurred generally to each breach. The Court sustained the demurrers, and rendered final judgment for the defendants.

The ground assumed in vindication of the decision of the Circuit Court is, that the execution, with regard to which the constable is charged with a violation of his duty, recited a judgment beyond the jurisdiction of the justice, and is therefore void on its face, and was not obligatory upon the constable.

In support of this position, it is contended that the judgment recited appears to have been rendered in an action of debt, in which the *debt* itself, exclusive of interest and cost, was over \$100. If this were the fact, it would be a fatal objection to the validity of the execution, for justices

[*140] *have no jurisdiction in actions of debt and assumpsit, where the sum due or demanded, exclusive of interest and costs, exceeds that amount. R. S., 1838, p. 364. It may be admitted (though the execution does not show it), that the judgment was rendered in an action of debt, but it certainly does not appear that the original *debt* demanded was

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more than \$100. The judgment shown by the execution was for the sum of \$102.36, with interest from the date of the judgment. The original debt may have been less than \$100 and the interest upon it may have been sufficient to make the amount of both equal the sum for which the judgment was rendered. In such a case the justice had jurisdiction; and we do not conceive that his judgment is a nullity, though in rendering it he failed to distinguish between principal and interest. We must presume, as the contrary does not appear, that the justice did not violate his duty by exceeding his jurisdiction. The execution is legal upon its face, and the demurrers to the several breaches assigned in the declaration should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. A. Porter, for the plaintiff.

J. W. Payne, for the defendants.

CLAWSON and Another v. LOWRY.

FRAUD—EVIDENCE.—Debt on a promissory note. Pleas, fraud and failure of consideration. The defendant offered in evidence, on the trial, an advertisement by the plaintiff for the private sale of certain real estate, for a part of the price of which the note sued on had been given. The advertisement represented the land as containing a coal bank, &c., and had been inserted in a newspaper published in the county in which the land was situate. There was no proof of the publication of the advertisement except in *December*, 1838; and the purchase of the land was not made until *April*, 1840; nor did it appear that the advertisement had been ever seen by the defendant. *Held*, that the advertisement, under the circumstances, was inadmissible as evidence.

PRACTICE.—A party may introduce his evidence in the order he prefers, provided there is reason to suppose that the evidence offered is connected with the cause.

[*141] *ERROR to the Warren Circuit Court.

BLACKFORD, J.—*Lowry* brought an action of debt on a promissory note against the makers. Pleas, fraud in

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obtaining the note, and failure of consideration. Replications in denial of the pleas. Verdict and judgment for the plaintiff for the amount of the note.

The defendants offered in evidence, on the trial, an advertisement by the plaintiff for the private sale of certain real estate, for a part of the price of which the note sued on had been given. The advertisement represented the land as containing a coal bank, &c., and had been inserted in a newspaper published in the county in which the land was situate. There was no proof of the publication of the advertisement except in *December*, 1838; and the purchase of the land was not made until *April*, 1840; nor did it appear that the advertisement had been ever seen by the defendants. Under these circumstances, the advertisement was objected to as evidence and rejected.

There was no error in rejecting this evidence. Such a long time had elapsed from the time of the advertisement to that of the purchase, that there was no reason to suppose, in the absence of all testimony on the subject, that the advertisement had formed any part of the contract. The testimony was therefore inadmissible on the ground of irrelevancy.

The defendants say they had a right to introduce their evidence in the order they preferred; and that is no doubt true, provided there is reason to suppose that the evidence offered is connected with the cause; but when, as in this case, there is no ground for such a supposition, the evidence must be rejected.

Per Curiam.—The judgment is affirmed with 3 *per cent.* damages and costs.

D. Brier and R. C. Gregory, for the plaintiffs.

R. A. Chandler, for the defendant.

[*142] *DOE, on the Demise of BRUMFIELD, v. BROWN.

VENDOR AND PURCHASER—EJECTMENT. —Where a person enters into possession of real estate under a contract of sale, the vendor may, at any time previously to executing the conveyance, demand possession of the premises,

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and may also, if the demand be not complied with, recover the possession of them in an action of ejectment.(a)

NOTICE TO QUIT.—The statute concerning tenants holding over, which requires three months' notice to quit, is not applicable to the above-named case, there being in that case no tenancy in which rent was reserved.

· ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of ejectment on the demise of *Margaret Brumfield* against *William Brown*, for a tract of land in *Fayette* county. Plea, not guilty. The cause was submitted to the Court, and judgment rendered for the defendant.

The facts are as follows: The lessor of the plaintiff being the owner of the land, contracted with the defendant and one *Bolton* to sell them the same for \$3,000, payable by installments. A title-bond was accordingly executed by the vendor to the vendees, conditioned for a conveyance of the land on payment of the purchase-money; and the latter gave their notes to the former for the purchase-money, payable agreeably to the contract of sale. The notes were afterwards assigned, and a judgment on some of them was obtained by the assignee. Only \$500 of the purchase-money have been paid; the legal title to the land remains in the vendor; and *Brown* is in possession. Before the commencement of the suit, the lessor of the plaintiff demanded possession of *Brown* and the same was refused.

The defendant proved by parol that shortly after the agreement, Mrs. *Brumfield* removed from the premises, and that he, the defendant, took possession of the same, and has occupied them ever since. This parol evidence was objected to, but the objection was overruled.

The facts proved by parol, supposing the evidence admissible, do not affect the case. We consider the law on the subject to be, that where a person enters into possession of real estate under contract of sale, the vendor may, at any time previously to executing the conveyance, demand possession of the premises, and may also, if the demand be not complied

(a) *Wright v. Blachley*, 3 Ind., 101.

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[*143] *with, recover the possession in an action of ejectment. The following case supports that doctrine: Ejectment. The lessors of the plaintiff having proved their title, the defendant stated, that one of the lessors had agreed to sell the land to one *Blackwell*, who had paid £524, which was part of the purchase-money, on which he was let into possession; he being willing to pay £113 more, which was the residue of the purchase-money, on a proper conveyance being executed. The Court said that if there had been any demand of possession, or any thing to determine the estate at will which Mr. *Blackwell* had, the plaintiff was entitled to recover at law. The plaintiff then proved a demand of possession, and the jury, by direction of the Court, rendered a verdict for the plaintiff. *Doe d. Hiatt et al. v. Miller*, 5 Carr. & Payne, 595. The demand is in such cases necessary in order to place the vendee, whose entry was legal, in the situation of a wrongdoer. *Right d. Lewis et al. v. Beard*, 13 East, 210; *Taylor v. McCrackin*, 2 Blackf., 260; *Stackhouse et al. v. Doe d. Reynolds et al.*, 5 Id., 570.

The defendant contends that he was, at all events, entitled to three months' notice to quit by virtue of the statute concerning tenants holding over. R. S., 1838, p. 584. The statute, however, only applies to cases where the relation of landlord and tenant exists between the parties, a rent being reserved; but here there was no tenancy in which rent was payable, and the case, therefore, is not within the statute. The defendant was, to be sure, in possession of the premises with the consent of the lessor of the plaintiff, but that was all; and the right to such possession was determined at law by the demand of the possession made before the commencement of the suit.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. H. Smith and *C. B. Smith*, for the plaintiff.

S. W. Parker, for the defendant

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*DUGAN v. MELOGUE.

APPOINTMENT OF CONSTABLE.—A constable, appointed by a justice of the peace to levy an execution on the goods of *A*, levied the same on the goods of *B*. A trial of the right of property was claimed by *B*, who gave bond, &c., but the constable refused to deliver the goods to *B*. *Held*, that, for this misconduct of the constable, the justice was liable to *B* in an action on the case.

MEASURE OF DAMAGES.—The jury in such case may, though the constable tender the property to the plaintiff before suit brought, give the value of the property as the amount of the damages.

APPEAL from the *Hendricks* Circuit Court.

SULLIVAN, J.—Case by *Melogue* against *Dugan*. The declaration contains three counts. The cause of action is substantially as follows: *Dugan*, who was an acting justice of the peace, rendered a judgment in favour of one *Burnett* against *Henry Burger*, and there being no constable in the township, appointed *Pemberton S. Dicken* a special constable, to whom he directed an execution commanding him to levy the amount of the above-named judgment of the goods and chattels of *Burger*. The appointment was made under the 55th section of the justice's act. *Dicken* levied the execution on a buggy and harness, amongst other things, the property of *Melogue*. The latter claimed the buggy and harness, and demanded a trial of the right of property according to the statute. At the time of filing his claim to the property, he also filed a bond with security, which was approved by the justice, conditioned that his claim should be well and truly prosecuted to effect, or in default thereof that the property should be delivered to the person entitled to receive it. The justice of the peace, with whom the bond was filed, immediately informed the constable of it, and *Melogue* demanded the property, but the constable refused to deliver it. Plea, not guilty; verdict and judgment for the plaintiff.

This suit is founded on the 55th section of the act regulating the duties and jurisdiction of justices of the peace, R. S., 1838, p. 376, which provides that in all cases where it shall be neces-

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sary to have process served, and there shall be no constable in the township legally authorized to act in such case, it shall be lawful for any justice of such township to appoint a [*145] person willing to serve as constable until one shall *be legally appointed, &c., and the justice shall stand as security, and be also civilly liable for any neglect of duty, or any illegal proceedings, on the part of the constable so by him appointed.

Various exceptions were taken to the judgment of the Court in receiving and rejecting testimony, and to instructions given to the jury and refused to be given, but we discover no error in either for which the judgment ought to be reversed.

The points relied on for the reversal of the judgment by the counsel for the appellant are, that the action is misconceived, and that the damages are excessive.

It is not denied but that the constable was guilty of a trespass in seizing the property of *Melogue*, instead of the property of *Burger* the execution-defendant. For that act the constable might be sued as a trespasser, and his refusal to deliver the property to *Melogue* on demand was a continuation of the trespass. But *Dugan* was not present aiding and assisting in the wrongful acts of the constable, nor were they done by his command. He, therefore, can not be made liable for those acts in an action of trespass. Even in the case of master and servant, the master is not considered as a trespasser for an act of his servant which was not done at his command. He may, however, in numerous cases, be made liable for the damage arising from the employment of negligent or unskillful servants, in an action on the case. We think there is no objection to the form of action adopted in this case. The statute, whatever may be the object intended to be gained by it, makes the justice responsible for any illegal proceeding on the part of the officer appointed by him. The appointment is his act, the breach of duty by the constable is the act of the latter, and for any damage sustained in consequence of such appointment, we think an action on the case is the appropriate remedy. *McManus v. Crickett*, 1 East, 106; *Burnett v. Lynch*, 5 B. &

Cox and Others v. Hodge.

C.. 589, *per Littledale, J.*; *Morley v. Gaisford*, 2 H. Bl., 442.

As to the second point, we think the jury were justifiable in giving the value of the property as the amount of the damages. The plaintiff in error contends that as the constable tendered the property to *Melogue* before suit brought, the [*146] *damages should have been only for the temporary deprivation of it. There are cases in which the Court will stay proceedings upon the restoration of the property, and payment to the plaintiff of such damages as he may have sustained by the temporary loss and deterioration of the property, and his costs. Admitting this to be such a case, and the property to be such as a Court would order the restoration of, no application was made to the Court for that purpose. The defendant should have followed up the tender made by *Dicken* with such an application, and an offer to pay to the plaintiff the damages he had sustained and the costs he had incurred. *Shotwell v. Wendover*, 1 Johns. R., 65; 2 Selw. N. P., 1417; *Pickering v. Truste*, 7 T. R., 49.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

J. Morrison, for the appellant.

C. C. Nave, for the appellee.

COX and Others v. HODGE.

JOINT MAKERS OF NOTE—DISCHARGE.—If two persons make a promissory note, and one of them afterwards obtain possession of the note as his own property from the payee, the note is discharged. (a)

APPEAL from the *Hendricks* Circuit Court.

SULLIVAN, J.—Assumpsit by *Hodge*, for the use of *Shannon*, against *Cox*, *Atkins*, *Merritt*, and *Nichols* on a promissory note. The *capias* was returned “not found” as to *Atkins*; *Cox*, *Mer-*

(a) See *Owensby v. Platt*, 3 Ind., 459.

ritt, and Nichols, appeared and pleaded: 1, Non assumpsit; 2, That the note sued on was given by defendants with said *Atkins*, as part consideration of a certain tract of land purchased by *Atkins* from *Hodge*, and that afterwards, &c., *Hodge* and *Atkins*, by an agreement made between them, canceled and rescinded the contract for the sale of said land, and *Hodge* received said tract of land so sold as aforesaid from *Atkins* freed and released from said contract; and did then and there deliver up to *Atkins* the promissory note on which this suit is founded fully discharged and satisfied, &c.; 3, That, [*147] on, &c., the said promissory *note was "delivered to *Atkins* by *Hodge* fully paid and satisfied," &c.; 4, Payment by *Atkins*. The plaintiff replied to the second plea, substantially, that the note was given in consideration of a tract of land sold by *Atkins* to *Cox*; that it was made payable to *Hodge* for the accommodation of *Atkins* and at his request, as part payment by *Atkins* to *Hodge* of the land purchased by the former from the latter as mentioned in said plea, and that *Atkins* signed the note as surety for *Cox*, &c.; and that when the contract between *Atkins* and *Hodge* was rescinded, as in said plea mentioned, the note was delivered to *Atkins* by *Hodge* as his own property, who afterwards for value received sold it to *Shannon*, for whose use this suit was brought, &c. The replication to the third plea denied that the note was delivered up satisfied and canceled as alleged; and the replication to the fourth plea denied the payment by *Atkins*. The defendants demurred to the replication to the second plea, but the Court overruled the demurrer. Issues were formed on the remaining pleas, and the cause was submitted to the Court for trial. Judgment for the plaintiff.

We are of opinion that the demurrer to the replication to the second plea should have been sustained. The replication is defective, because it shows that the note was discharged. *Hodge*, the payee, having received from one of the makers of the note an equivalent for it, surrendered it to him *as his own property*, which operated as an extinguishment of the debt. If *Atkins* was really the surety of *Cox*, and has paid the debt

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of his principal, the law affords him a remedy. It is not by suing on a note that has been discharged.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the appellants.

J. Morrison, for the appellee.

[*148] *THE STATE v. THURSTON and Others.

CRIMINAL LAW—COSTS.—When a person accused of a crime before a justice of the peace, is recognized to appear in the Circuit Court, and is convicted in that Court, the costs of the examination before the justice should not be included in the judgment.

ERROR to the *Franklin* Circuit Court.

DEWEY, J.—This was a motion made in the Circuit Court to tax costs. The defendants in error, with several other persons, were prosecuted before a justice of the peace for a riot. The accused parties took a change of venue to another justice, who inquired into the charge, and recognized several of them to appear before the Circuit Court. An indictment was found against the defendants in error for the riot complained of, they were tried, convicted, and fined; judgment accordingly, and for the costs of prosecution. The question presented by the motion to tax the costs is, whether the convicted persons were liable for the costs which were made before the examining magistrates. The Circuit Court held them not to be so liable.

This question depends entirely upon statutory provisions. The indictment is founded upon the act respecting crime and punishment, the 78th section of which provides that “prosecutions” in the Circuit Court, under that act, shall be instituted by presentment or indictment. R. S., 1838, p. 219. The 80th section enacts that, in all cases of conviction of any offense named in the statute, the costs of “prosecution” shall be included in the judgment rendered against the convict, unless

 Thomas v. Bailey.

the jury expressly find otherwise. *Id.*, 220. A justice of the peace, who recognizes a person accused before him, is bound to send up the recognizance to the Circuit Court; but he is not required to accompany it with a transcript of his proceedings, nor with a statement of the costs of examination. *R. S.*, 1838, p. 360. Had the Legislature designed that these costs should be taxed against the convict in the Circuit Court, it is reasonable to suppose they would have required them to be certified up, and expressly included them in the judgment. We are strengthened in this conclusion by the fact, that they did make such provisions in cases of misdemeanors triable before justices and appealable to the Circuit Court. Those cases, [*149] when appealed, commence in *the Circuit Court "*de novo* by indictment;" but the justice is required to send up a transcript of his proceedings, and the costs made before him are required to be taxed against the convict in the Circuit Court. *Id.*, 362.

We think the term, "prosecution," in the 80th section of the act respecting crime and punishment, in reference to the costs for which a convicted person is liable, has the same meaning expressed by it in the 78th section, and does not extend beyond the presentment or indictment. We do not mean to say, however, that the same word, as used in other parts of the statute, has not a more extended signification.

The judgment of the Circuit Court is correct.

Per Curiam.—The judgment is affirmed.

G. Holland, for the State.

J. M. Johnston, for the defendants.

 THOMAS v. BAILEY.

NOTICE BY PUBLICATION.—Notice in a newspaper to a non-resident defendant in a bill in chancery, to appear before the Circuit Court of the proper county on the first day of its next term, is sufficiently certain as to the time and place of appearance.

Parker and Another v. Miller, Administrator, in Error.

ERROR to the *Clinton* Circuit Court.

DEWEY, J.—This was a bill in equity to foreclose a mortgage. The defendant made default, and the bill was taken as confessed. Final decree for the complainant according to the prayer of the bill.

It is contended the decree is erroneous, because the defendant was not legally notified of the pendency of the bill. The notice, which was given in a newspaper by the clerk of the Court on affidavit of non-residence filed in vacation, stated the names of the parties, the nature of the bill, the time of filing it, the filing of the affidavit, and required the defendant to appear before the Circuit Court of the proper county “on the first day of its next term, and plead, &c., on or before the calling of the cause,” &c. The objection urged against the notice is, that it omits to state the time and place of holding the Court at which the defendant was required to appear. We do not [*150] think the objection valid. The statute, *prescribing the mode of giving notice to non-resident defendants in bills of equity of the pendency of the suit, was complied with, so far as the time and place of appearance are concerned, by notifying the defendant to appear on the first day of the Circuit Court at its next term. R. S., 1838, p. 444.

Per Curiam.—The decree is affirmed with costs.

G. Taylor and J. H. Bradley, for the plaintiff.

R. Jones, for the defendant.

PARKER and Another v. MILLER, Administrator, in Error.

IF two partners be indebted for goods sold and delivered, and one die in the lifetime of the other, the administrator of the deceased partner may, by statute, be sued at law for the debt. *Ransom v. Pomeroy*, 5 Blackf., 383.

Henton and Another v. Beeler.

HENTON and Another v. BEELER.

ENDOR AND PURCHASER — FAILURE TO CONVEY.—Debt on a sealed note for the payment of money. Plea, that the consideration of the note was certain land (describing it) belonging to one *A*, an infant; that at the time the note was given, the land was sold at private sale to the defendant by one *B*, a commissioner appointed by the Probate Court for that purpose; that three notes were given by the defendant for the payment of the purchase-money by installments, on one of which notes, being the one last due, this suit is founded; that at the time the notes were given, *B*, as commissioner as aforesaid, executed his bond obligating himself to convey all the right and title of said *A* in said land to the defendant, on payment of the purchase-money, provided the sale should be confirmed, but if set aside, the notes were to be returned to the defendant; that *B* has not made or tendered, nor offered to make or tender to defendant a conveyance for the land either absolutely or conditionally, or otherwise, but has hitherto failed to do so; that he can not make such conveyance, and the consideration of the note has therefore failed, &c. *Held*, that the plea was good.(a)

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—*Joseph Beeler* brought an action of debt against *George W. Carson*, *Benjamin Armstrong*, and *William Henton*. The suit was founded on a sealed note [*151] for \$266.66, payable to the plaintiff, guardian of *George Matlock*, an infant. The writ was returned “not found” as to *Carson*.

Armstrong and *Henton* pleaded as follows: That the consideration of the note was certain land (describing it), belonging to *George Matlock*, an infant; that at the time the note was given, the land was sold at private sale to *Carson* for \$800, by one *Nichols*, a commissioner appointed by the Probate Court for that purpose; that three notes were given by *Carson* and the defendants his sureties, for the payment of the purchase-money by installments, on one of which notes, being the one last due, this suit is founded; that at the time the notes were given, *Nichols*, as commissioner as aforesaid, executed his bond obligating himself to convey all the right and title of said *George*

(a) See *Suain v. Morberly*, 17 Ind., 99; 5 Id., 517.

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Matlock in said land to *Carson* on payment of the purchase-money, provided the sale should be confirmed by the Court, but if the sale should be set aside, the notes were to be returned to *Carson*; that *Nichols* has not made or tendered, nor offered to make or tender to *Carson*, a conveyance for the land either absolutely or conditionally, or otherwise, but has hitherto failed and refused to do so; that he can not make such conveyance, and the consideration of the note sued on has therefore, failed, &c.

Replication, that the sale mentioned in the plea was made by *Nichols* as a commissioner, appointed by the Probate Court, &c., in a case then pending, in which the plaintiff as guardian of *George Matlock*, an infant, filed a petition as such guardian to obtain an order, among other things, for the sale of the premises described in the plea, and which premises were thereupon sold by *Nichols* as commissioner as aforesaid by virtue of his said appointment.

General demurrer to the replication and judgment for the plaintiff.

The replication is evidently no answer to the plea, but it is contended that the plea is insufficient. The plea appears to us, however, to be unexceptionable. It alleges the note to have been given for the last payment for certain real estate belonging to an infant, sold by a commissioner appointed for the purpose by the Probate Court; that the commissioner bound himself to the purchaser by bond, at the time of the [*152] *sale, to convey to him the infant's interest in the estate on payment of the purchase-money, if the sale should be confirmed, and if it should be set aside, to return the notes, &c. According to these allegations, the payment of the purchase-money to the plaintiff and the executing of the conveyance were to be concurrent acts, and though the sale were confirmed, the payee could not recover on the note sued on, the one last due, without at least showing that a conveyance had been offered on payment, at the same time, of such note. See *Taylor v. Perry*, 5 Blackf., 599.

The plaintiff contends that the statute under which these

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sales are made, requires the purchase-money to be paid before the making of the deed. It is sufficient, however, for the defendants in this case to show that the contract was otherwise.

The sale itself may be objectionable if not authorized by the statute, but that view of the subject would not benefit the plaintiff.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the plaintiffs.

C. Fletcher, O. Butler, and S. Yandes, for the defendant.

BEAN v. KEEN.

LOST NOTE.—Debt by an assignee against the maker of a promissory note alleged to be lost. Pleas, *nil debet* and failure of consideration. *Held*, that, the oath of the plaintiff was admissible to prove to the Court the loss of the note. *Held*, also, that to enable the plaintiff to recover, he must prove by disinterested witnesses, not only the contents of the note, but that there was on it an indorsement to himself.^(a)

ERROR to the *Harrison* Circuit Court.

SULLIVAN, J.—Debt by *S. Keen* the assignee against *Bean* the maker of three several promissory notes. Pleas, the general issue, and a failure of consideration. *Similiter* to the first plea, and a replication to the second. Verdict and judgment for the plaintiff.

The allegations in the declaration are, that the notes on which the suit was brought were executed by *Bean*, [*153] the *plaintiff in error, and made payable to one *Baldwin*, and by him assigned to *Timberlake*, who assigned them to one *Abner Keen*, by whom they were assigned to the plaintiff; and that they have been lost out of the plaintiff's possession, &c.

The testimony of the plaintiff in the Court below, was

(a) *Templin v. Kruhn*, 3 Ind 373

received to prove the loss of the instruments on which the suit was brought, to which the defendant objected. There was no error in this. The oath of a party in a cause may be received to prove to the Court the loss of an instrument of writing, in order to lay a foundation for the introduction of secondary evidence to prove its contents. 1 Pet., 591; 16 Johns., 193; 3 Pick., 287; 7 Id., 62; 8 Id., 278.

The plaintiff then introduced a witness by whom he proved, that he (the witness) had seen four notes signed by the defendant, three of which answered the description of the notes sued on; that they were made payable to *Smith Baldwin*, by him indorsed to *Timberlake*, and by the latter to *Abner Keen*; that when he saw them they were in *Abner Keen's* possession; and that the plaintiff lived with *Abner Keen*. This was all the testimony in the case.

The defendant asked the Court to give to the jury the following instruction, viz.: That if it were not satisfactorily proved, that the notes described in the plaintiff's declaration were assigned to the plaintiff before the commencement of the suit, they should find for the defendant. The Court refused the instruction; but, on the plaintiff's application, they instructed the jury that the pleas of the defendant admitted the execution of the notes and the indorsements thereon, and as the defendant had introduced no proof of the failure of consideration, the plaintiff was entitled to a verdict, &c.

It was necessary for the plaintiff in this case to show that he had a legal title to the notes sued on. The general issue denied the defendant's indebtedness to the plaintiff, and it devolved on the plaintiff to prove it. Having established the loss of the notes to the satisfaction of the Court, he should have proved by disinterested witnesses, not only their contents, but that there were indorsements on them to himself. By such proof only could he establish his right to the debt sued for.

[*154] We have heretofore decided, in a suit by the *assignee against the maker of a promissory note, where the general issue was pleaded, that the assignment of the note must be shown to the jury to entitle the plaintiff to a verdict

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Arnold v. Sturges, 5 Blackf., 256. If the note be not lost, and there be no plea under oath denying the assignment, the production of the note and assignments will be sufficient; if it be lost, and the loss be established to the satisfaction of the Court, secondary evidence will be received.

In this case the proof was, that, when the notes were last seen, they were the property of *Abner Keen*, not the property of the plaintiff. This proof was not sufficient to entitle the plaintiff to a verdict, and the Court should have instructed accordingly.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. A. Porter and *H. P. Thornton*, for the plaintiff.

J. W. Payne, for the defendant.

DOE, on the Demise of WOLF and Others, v. HEATH and Another.

DEATH OF DEFENDANT AFTER LEVY.—If a *fiery facias* be levied on real estate, and the defendant die before the completion of the execution, the sheriff may afterwards proceed to advertise and sell the land.(a)

JUDICIAL SALE.—The title of a purchaser of real estate at sheriff's sale, who pays the purchase-money and receives the sheriff's deed, can not be affected by the circumstance that the return of the execution is imperfect, or that none was made.(b)

MORTGAGE.—The sale of mortgaged land under a decree of foreclosure, &c., must be according to the statute in force when the mortgage was executed.(c)

APPEAL from the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Ejectment. The declaration contains three counts. The first count is on a demise from the heirs of *J Nathan Wolf*, deceased, and *Simon Whitcomb*; the second is on a demise from the heirs of *Wolf*; and the third is on a demise

(a) *Murphy v. Hayes*, 4 Ind., 117.

(b) *The State v. Salyers*, 19 Ind., 432. 17 Id., 513; 10 Id., 289.

(c) *Franklin v. Thurston*, 8 Blackf., 160.

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from *Whitcomb*. Plea, not guilty. The cause, by consent of parties, was tried by the Court. Judgment for the defendants.

The following were the facts of the case: At the *April* term, 1838, of the *Tippecanoe* Circuit Court, four several [*155] judgments were rendered against *Jonathan Wolf*, all amounting to the sum of \$827, or thereabouts. On the 12th of *March*, 1839, executions of *fieri facias* were issued on the judgments, which came to the sheriff's hands on the 16th of the same month, and were levied on the land in controversy on the 3d of *April* following. On the 15th of *April*, *Jonathan Wolf* died, and the sheriff, notwithstanding the death of *Wolf*, proceeded to execute the writs, and accordingly advertised and sold the land. The sheriff's return to each of the writs is substantially as follows, viz.: Levied this execution with others on the following property, "the southwest fraction," &c., taken as the property of *Jonathan Wolf*, and money made in full by distress and sale of the above-mentioned property. On the 30th of *April*, a deed was made by the sheriff to *Simon Whitcomb* for the land described in the levy, as the purchaser at the sale. At a subsequent term of the *Tippecanoe* Circuit Court, the same land, by virtue of a decree in favour of *Whitaker* and *Snyder* against *Whitcomb* and wife, was ordered to be sold by the sheriff, which was accordingly done, and at such sale *R. A. Lockwood* became the purchaser, and received a deed for the premises from the sheriff. *Lockwood* and wife afterwards conveyed to the defendants. The judgments against *Wolf*, and the decree in favour of *Whitaker* and *Snyder* for the sale of the land, were admitted. It was also admitted that executions of *fieri facias* were issued on the judgments against *Wolf*, and that by virtue of those executions, the premises mentioned in the declaration were levied upon and sold, and that a deed was made by the sheriff to *Whitcomb* as the purchaser; that on the decree in favour of *Whitaker* and *Snyder*, an order of sale in the nature of an execution was also issued, by virtue of which the lands were sold by the sheriff to *R. A. Lockwood*; that a deed was made by

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the sheriff to *Lockwood*; and that *Lockwood* conveyed to the defendants.

Objections were made, during the trial, to the introduction of the executions against *Wolf* and the returns indorsed, and of the deed of the sheriff to *Whitcomb*, to the order of sale in the case of *Whitaker* and *Snyder* against *Whitcomb* and the return on it, and to the deed from the sheriff to *Lockwood*, as evidence in the cause, but the objections were over-
 [*156] ruled *and they were received. The evidence was objected to for the reasons, 1, That the sale of the land upon the executions against *Wolf* was made after the death of *Wolf*; 2, That the return of the sheriff to the writs did not show who was the purchaser; and, 3, That the sale to *Lockwood*, under the decree of *Whitaker* and *Snyder* against *Whitcomb*, was void, because it was not upon a credit, &c., as required by the statute in force at the time of the sale.

The first objection is predicated on the supposition that a sale of lands on execution, after the death of the execution-defendant, notwithstanding a levy was made in his lifetime, is a void sale and passes no title to the purchaser. By the common law, lands could not be taken in execution upon a writ of *fiери facias*, the goods and chattels alone of the defendant being liable to seizure by virtue of that writ. If the defendant died after execution awarded, the writ might be served upon his goods in the hands of his executor or administrator. By statute, a *fiери facias* in this State reaches the lands, as well as the goods and chattels of the execution-defendant. If the goods and chattels of a defendant be seized, and he die before execution is completed, they may, notwithstanding the death, be sold by virtue of the execution. We see nothing in the statute from which we can infer, that a distinction was intended to be made in this respect, between a levy on the lands and a levy on the goods and chattels of the debtor. The mode of proceeding is the same in both cases. A similar construction was given to the statute of *Pennsylvania* by Judge *Washington*, in *Bleecker v. Bond*, 4 Wash. C. C. Rep., 6.

The second point can not avail the plaintiff in error. It is

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true, if *Whitcomb* relied upon the execution and return for proof that he was the purchaser of the land and that were all the proof in the case to sustain his title, it would be insufficient. The sheriff's return would not be sufficient to satisfy the statute of frauds. But a deed was made by the sheriff to *Whitcomb* as the purchaser of the land, and that is sufficient. A purchaser at sheriff's sale, who pays his money and receives a deed from the sheriff for the land levied on and sold, can not be prejudiced if the sheriff make an imperfect return, or if he make no return at all.

[*157] *We are also of opinion that the third objection is not maintainable. It does not appear from the record, that the sale under the decree was not made on a credit as required by the statute. From the sheriff's return to the order of sale, we may fairly conclude that it was so made. At all events, if the statute in that particular was not pursued, we are constrained by high authority to say that the sale was not, for that reason, void. The decree was rendered, and of course the debt contracted, before the statute was enacted. *Bronson v. Kinzie et al.*, 1 Howard, 311. Although we do not adopt all that is said in that case, yet the point being one of constitutional law, and being decided by the highest judicial tribunal in the nation, we are compelled to yield to it.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, for the appellant.

Z. Baird, for the appellees.

COLLINS v. HARBOLD, in Error.

DEBT on a writing obligatory. Pleas, *nil debet* and payment. Judgment by default. *Held*, that the judgment was erroneous.

The State v. Aydelott.

THE STATE v. AYDELOTT.

MALICIOUS TRESPASS—INDICTMENT.—An indictment for malicious trespass alleged that the defendant did “maliciously and mischievously injure and cause to be injured a certain house, the property of one *William McMahon*,” situate, &c., “of the value of \$50.00, to the damage of said *William McMahon* \$5.00, contrary to the form of the statute,” &c. *Held*, that the offense was insufficiently described.(a)

SAME.—The indictment should have shown the specific injury done to the house.(b)

ERROR to the *Harrison Circuit Court*.

DEWEY, J.—This was a prosecution for a malicious trespass. The indictment charged that the defendant did “maliciously and mischievously injure and cause to be injured a [*158] *certain house, the property of one *William McMahon*,” situate, &c., “of the value of \$50.00, to the damage of the said *William McMahon* \$5.00, contrary to the form of the statute,” &c. The Court, on the motion of the defendant, quashed the indictment.

We think the decision was right. The description of the offense is too vague. It is true, that in describing the crime, the indictment adopts the language of the statute creating it. But this mode of setting out an offense is not always attended with the requisite certainty. There is in general no essential difference, as to the precision required in describing the crime, between an indictment at common law, and one founded on a statute. 1 Chitt. C. L., 275. And it has accordingly been held, that an indictment for obtaining money by *false pretences* was bad, although the description of the offense given by the statute was pursued in the indictment. It was considered necessary for the indictment to show what the false pretences were. *The King v. Mason*, 2 T. R., 581.

The indictment under consideration should have shown the specific injury done to the house. This was necessary in order

(a) *The State v. Cleringer*, 14 Ind., 336; 1 Id., 511.

(b) *Bowles v. The State*, 13 Ind., 427; 8 Id., 200; 1 Id., 499; 7 Id., 279.

Vermilya and Another v. Davis.

to apprise the defendant, with certainty, of the crime with which he was charged, and to enable him to plead the verdict in any future prosecution for the same offense.

Per Curiam.—The judgment is affirmed.

W. A. Porter, for the State.

J. W. Payne, for the defendant.

VERMILYA and Another v. DAVIS.

APPEARANCE.—If a defendant appear to an action before a justice of the peace without objecting to the process, he can not object to it on appeal in the Circuit Court.

ERROR to the *Huntington* Circuit Court.

DEWEY, J.—*Vermilya* and *Stewart* commenced an action of assumpsit against *Davis* before *W. G. Johnson*, a justice of the peace, and recovered judgment against the defendant by default. On the application of the defendant, the judgment was opened and a new trial granted. A change of venue was awarded on the affidavit of the defendant, transferring [*159] *the cause before *J. Johnson*, another justice of the peace. He issued a summons to the defendant, returnable on the 16th of *September*, 1842, “at 10 o’clock, p. m.” On that day the parties appeared; and the defendant making no defense, judgment went for the plaintiff. The defendant appealed, moved the Circuit Court to dismiss the action on account of irregularity in the proceedings before justice *J. Johnson*, and the motion prevailed. Judgment for costs against the plaintiff.

The irregularity complained of is, that the summons was returnable at an improper time of the day, to wit, 10 o’clock, p. m.

We think the appearance of the defendant before the justice, without objecting to the process, was a waiver of all right to object to it in the Circuit Court; and that an error was committed by dismissing the action.

Conaway and Another v. Hays.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson and *R. Brackenridge*, for the plaintiffs.

W. Wright, for the defendant.

CONAWAY and Another v. HAYS.

MISNOMER.—Suit against *Daniel Conaway*, junior, and *Daniel Conway*, senior.

The defendants pleaded separately as follows: *Daniel Conaway*, junior, against whom the plaintiff hath declared by the name of *Daniel Conaway*, junior, says he is called by the name of *Daniel Conaway*, junior, &c. *Daniel Conaway*, senior, against whom the plaintiff hath declared by the name of *Daniel Conway*, senior, says he is called by the name of *Daniel Conway*, senior, &c. Held, that the first plea was a nullity. Held, also, that the second plea might have been replied to by alleging that the defendant, *Daniel Conaway*, senior, was called and known as well by the name of *Daniel Conway*, senior, as by the name of *Daniel Conaway*, senior, &c.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—*Hays* brought an action of debt against *Daniel Conaway*, junior, and *Daniel Conway*, senior. The defendants pleaded separately in abatement as follows:

Daniel Conaway, junior, against whom the plaintiff hath declared by the name of *Daniel Conaway*, junior, [*160] comes and *says he is named and called by the name of *Daniel Conaway*, junior, &c.

Daniel Conway, senior, against whom the plaintiff hath declared by the name of *Daniel Conway*, senior, comes and says that he is named and called by the name of *Daniel Conway*, senior, &c.

Replication, that the said *Daniel Conaway*, junior, who is sued by the name of *Daniel Conway*, junior, is as well known by the name of *Daniel Conway*, junior, as by the name of *Daniel Conaway*, junior, &c.

Verdict and judgment for the plaintiff.

The first plea is frivolous. The merely using a *v* instead of

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a *w* in *Conaway's* name, is too slight a mistake to deserve notice. That plea may be considered a nullity.

The second plea might have been replied to by alleging that the defendant, *Daniel Conaway*, senior, was called and known as well by the name of *Daniel Conway*, senior, as by the name of *Daniel Conaway*, senior, &c. The issue on the second plea would then have been, not how the defendant spelled his name, but how he was called and known. If it appear, in such cases, that the names have the same sound, there is no misnomer, however differently they may be spelled. *Tibbetts v. Kiah*, 2 New Hamp. Rep., 557.

The replication in this case is a nullity, it not being applicable to either of the pleas, and there was, therefore, no issue for the jury to try.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Ryman and *P. L. Spooner*, for the plaintiffs.

D. Macy, for the defendant.

MASSEY *v.* CHANCE.

CONTRACT —DEBT.—Debt on a writing obligatory, by which the defendant, for value received, promised to pay the plaintiff \$162.75, with interest from the date, to be paid on or before the session of the commissioner's Court of *Grant* county then next ensuing, provided that if the defendants proved to the satisfaction of said board that he had paid the plaintiff said money on an order given by said commissioners, at, &c., to one *Webster*, and [161] by him assigned to the plaintiff, then the obligation to be void, or so much thereof to be void as the defendant should prove had been paid on said order over and above the credits indorsed on it. *Held*, that debt was the proper form of action.

ERROR to the *Grant* Circuit Court.

BLACKFORD, J.—This was an action of debt for \$162.75. The declaration was substantially as follows: The defendant, on, &c., at, &c., by his writing obligatory, sealed with his seal,

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&c., for value received, promised to pay the plaintiff the sum of \$162.75 with interest from the date, on the following condition to wit, to be paid on or before the session of the commissioners' court of *Grant* county then next ensuing, provided that if the defendant proved to the satisfaction of the board of said commissioners, that he had paid the plaintiff said sum of money, on an order given by said commissioners at their *September* term, 1839, to one *Webster* and by him assigned to the plaintiff, then the obligation to be void, or so much thereof to be void as the defendant should prove had been paid on said order over and above the credits indorsed on it. Averment, that after the execution of said writing obligatory there was a session of said commissioners' court, but that the defendant did not then or at any other time prove, to the satisfaction of the board of said commissioners, that he had paid said money or any part of it, or that any part of said order had been paid over and above the credits indorsed on it; and that the defendant, though often requested, had not paid the said sum of \$162.75, or any part thereof, &c., to the plaintiff's damage, &c.

General demurrer to the declaration, and judgment for the defendant.

It is contended that covenant and not debt was the proper remedy in this case; but we are of a different opinion. If the averment in the declaration be true, the defendant is liable to the plaintiff on the obligation, not for unliquidated damages, but for a certain sum of money, to wit, \$162.75 with interest; which shows that the form of action is unobjectionable.

[*162] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

J. Smith and *J. Brownlee*, for the defendant.

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PIERCE v. GATES.

VENDOR'S LIEN.—A vendor's lien on real estate for unpaid purchase-money may be enforced against a purchaser from the vendee with notice.

CHANCERY—PRACTICE.—If an allegation in a bill in chancery be denied by the answer, the allegation must be proved by two witnesses, or by one witness and corroborating circumstances.

SAME.—If a distinct fact in avoidance be set up by an answer in chancery, such fact must be proved.

ERROR to the *Cass* Circuit Court.

SULLIVAN, J.—This was a bill in chancery filed by *Gates* against *Pierce* and one *Murray*, to enforce a lien set up by the complainant on a tract of land sold by him to *Murray*, and by *Murray* to *Pierce*, for a part of the purchase-money. The bill alleges that on the 9th of *October*, 1838, the complainant sold to *Murray* the tract of land described in the bill for the sum of \$300; that all the purchase-money except about \$116 was paid; that for the residue the notes of *Murray*, without any security whatever, were taken, part payable in sixty days and part in six months; that on the same day that complainant sold and conveyed to *Murray*, the latter sold and conveyed to *Pierce*; and that *Pierce* had notice that a part of the purchase-money was unpaid, &c. The answer of *Pierce* admits the sale by the complainant to *Murray* and by *Murray* to *Pierce*, but denies the notice, and sets up affirmatively that he was informed by the complainant that he had no lien or claim upon the land, and that he would give possession at any time, that he afterwards rented the land to the complainant, &c. The bill was taken as confessed against *Murray* who, it was admitted, had left the State insolvent; and upon the final hearing the Court decreed for the complainant.

The equitable lien of the vendor of land upon the land sold for the unpaid purchase-money, where no distinct
 [*163] security *has been taken, or the lien otherwise waived, is not denied. Nor is it denied but that the vendor's lien upon the land may be enforced against a pur-

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chaser from the vendee with notice. The main question in this case is, whether there is proof of notice.

Where an answer denies the allegations of the bill, the statute declares that the complainant shall not have a decree unless the bill be proved by two witnesses, or by one witness and corroborating circumstances. If the complainant have the proof required by the statute, the decree of the Circuit Court must stand.

Brown, a witness in the cause, states that a short time after *Murray* had left the country, he had a conversation with *Pierce* about the land he purchased from *Murray*, and which *Murray* had purchased from *Gates*; that in that conversation *Pierce* said "he paid *Murray* all down for the land," and "that he knew that *Murray* had promised *Gates* to pay him," and concluded by saying that "he had run off and never paid him." The plain import of the foregoing admission is, that at the time of the purchase by *Pierce* from *Murray*, the former knew that the purchase-money, or some part of it, was still due to *Gates*. The remaining proof is circumstantial, but we think it goes to establish the fact that *Pierce* had notice, at the time he purchased from *Murray*, that at least a portion of the purchase-money, on the sale from *Gates* to *Murray*, remained unpaid. It appears that *Gates* lived on the land, about eight miles distant from *Logansport*, that *Pierce* wished to purchase the land, and, on the day previous to the sale to *Murray*, had examined it and offered *Gates* \$250 for it, which he refused, but offered to sell for \$300. *Pierce* refused to buy at that price, and returned to *Logansport*. The next morning before breakfast, *Murray* came to the house of *Gates*, and after a very light examination of the land proposed to purchase it, offering *Gates* his price, viz., \$300. The parties agreed, and on the next day the land was conveyed to *Murray*, and *Murray*, on the same day that he received a conveyance, conveyed to *Pierce*. It further appears that *Pierce* resided in *Logansport*, that *Murray* boarded with him, and that the horse that *Murray* [*164] rode to the house of the *complainant when he came to purchase the land, was the same horse that the

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defendant rode the previous day. Without saying anything about the fraud which may be imputed to the defendant, we think it is fairly inferable from the circumstances that *Murray* purchased with the knowledge, if not for the use of *Pierce*; and if he did so, it is very improbable that *Pierce* was left uninformed of the terms of the contract. There is moreover in the depositions taken by the defendant, no proof that his purchase from *Murray* was for a valuable consideration. His statement to *Brown* is all the testimony on the subject. The matter as between them seems, so far as it is made to appear to us, to have been transacted in secret, a circumstance which, connected with other circumstances in the case, throws suspicion on the transaction.

There is one other question raised which must be noticed. The plaintiff in error contends that the affirmation in his answer, that *Gates* informed him that he had no claim or lien on the land, must stand as true unless disproved by the complainant. In this he is mistaken. It is a new fact introduced into the case by which the defendant seeks to discharge the land from the lien which the complainant claims. It is set up in avoidance of the complainant's equity, and must therefore be proved by the party asserting it. 2 Blackf., 324; 3 Id., 18.

We concur with the Circuit Court in the opinion, that *Pierce* purchased from *Murray* with notice of the complainant's equity, and that the latter has a lien upon the land for so much of the purchase-money as remains unpaid.

Per Curiam.—The decree is affirmed with costs.

H. Chase, for the plaintiff.

D. D. Pratt, for the defendant.

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CRIMINAL LAW.—An indictment for a capital offense can not be found in a Circuit Court in the absence of the president.(a)

(a) *Bradford v. The State*, 15 Ind., 347.

ERROR to the *Franklin* Circuit Court.

DEWEY, J.—This was an indictment for murder found at a term of the *Franklin* Circuit Court, held by the two associate judges in the absence of the president, by a grand jury impaneled, sworn, and charged by the Court so composed; to which Court the indictment was returned, and by whom it was received and recorded. At a subsequent term held by a full Court, the defendant was arraigned, tried, found guilty, and sentenced to death. Motions in arrest of judgment, and for a new trial, were overruled. Among the errors assigned is the following:

That a Circuit Court, consisting of the two associate judges only, is not competent to impanel, swear, and charge the grand jury in respect to a capital offense, and to receive an indictment for it.

The question raised by this objection is, independently of its connection with the life or death of an individual on the present occasion, one of an important nature. It involves the construction of our constitution in one of its most interesting features. It is now for the first time presented for the consideration of this Court, and has never, so far as we know, received the adjudication of any of the Circuit Courts. We have given it mature deliberation, and with but slight assistance from authority, have come to a conclusion satisfactory to our own minds.

The third section of the fifth article of the constitution, after declaring that each Circuit Court shall consist of a president and two associate judges, provides that “the president and associate judges, in their respective counties, shall have common law and chancery jurisdiction, as also complete criminal jurisdiction in all such cases, and in such manner, as may be prescribed by law. The president alone, in the absence of the associate judges, or the president and one of the associate judges, in the absence of the other, shall be competent to hold a Court, as also the two associate judges, in the
[*166] *absence of the president, shall be competent to hold a Court, except in capital cases, and cases in chancery.”

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The statute organizing Circuit Courts, in force when this indictment was found and tried, vested those Courts with complete civil and criminal jurisdiction not inconsistent with the constitution. R. S., 1838, p. 161.

No one will controvert the position, that a grand jury can not find an indictment for any offense, over which the Court to which the jury belongs has not cognizance. This is conceded by the counsel for the State; but it is contended that the constitution has delegated to the Circuit Court, when held by the two associate judges, general jurisdiction in all criminal cases, by empowering them to hold a Court; and that the restriction on their power contained in the exception does not reach to that portion of their jurisdiction, under which the grand jury is impaneled, sworn, and charged, and under which the indictment is returned into Court; but that it only restrains them from proceeding further with the cause after the indictment is returned.

This interpretation is founded upon the meaning, which those who hold to it give to the word *cases* as used in the exception in respect to proceedings for a capital offense. It is contended that *case* as there employed is synonymous with prosecution, (which, according the definition of *Blackstone*, is the commencement of a criminal suit by the indictment,) and that it does not include the proceeding prior to the indictment. We can not bring ourselves to concur in this construction. The same word *cases* is used as well in that part of the constitution which confers jurisdiction generally upon the Circuit Courts, as in that which restricts it when exercised by the associate judges only; and we can not suppose that the framers of the constitution designed to use it in the same paragraph, and in relation to the same general subject, in different senses. The Circuit Courts, whether held by all the judges, by the president alone, by the president and one associate judge, or by the two associates, have unlimited criminal jurisdiction "in all such *cases*, and in such manner, as may be prescribed by law," except that the associate judges shall not hold a Court "in capital *cases*." If this word, as used in the first instance,

[*167] was *designed to embrace (as undoubtedly it was) all the stages of criminal proceedings from the impanneling of the grand jury to the execution of the final sentence, we know of no rule of criticism by which it must not embrace the same proceeding, when designating the crimes over which a Court held by the associate judges shall not have jurisdiction. In our opinion the Circuit Court so held has no more power to impannel, swear, and charge a grand jury, and receive an indictment for a capital crime, than it has to try the cause and pronounce sentence.

But were it admitted that *case*, as the word is used in the restricting clause, means a prosecution commencing with the return of the indictment, our views with regard to the jurisdiction of the associate judges holding a Court would not be changed. If such a Court could receive the indictment, the *case*, or prosecution, would be commenced before it. The associate judges would still hold a Court in a capital *case* and thus the very letter of the constitution would be violated. Much more would the spirit of that instrument be disregarded, by permitting a Court so composed to exercise that branch of jurisdiction which is preliminary to the finding of the indictment—a jurisdiction involving the right and the duty of judging of the qualifications of grand jurors when challenged, of defining capital crimes, and of expounding the various principles of law which should govern the indictors in putting a man upon the defense of his life. We can not believe that those powers have been conferred upon the associate judges.

A case somewhat analogous to this occurred in *Massachusetts*. By one part of a statute of that commonwealth, one of the judges of the Supreme Judicial Court was authorized to hold a Court with ample and plenary criminal jurisdiction, but another part of the same statute provided, that an indictment for a capital offense should not “be heard, tried, and determined,” unless three judges were present. It was held, that the restriction did not affect the jurisdiction of the single judge as to the impanneling of the grand jury in a capital case, and receiving and recording the indictment; but that the pris-

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oner could not be arraigned without the presence of three judges. The decision turned upon the ground, that [*168] *general jurisdiction was given to one judge in all criminal cases, and that the restriction upon his power was, in terms, confined to the hearing, trying, and determining of the indictment, which included the arraignment. *Commonwealth v. Hardy*, 2 Mass. R., 303. It is evident from the remarks of C. J. *Parsons*, who delivered the opinion of the Court, that, had the language restricting the jurisdiction of the judge in capital cases been as general as that which conferred jurisdiction generally over all crimes whether capital or not, as is the case in our constitution, the decision would have been that a legal indictment for a capital offense could not have been found before him.

Various errors were assigned which we have not noticed, because it is not likely that the same points will arise in a trial of the defendant on a valid indictment.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the indictment set aside. Cause remanded with instructions to the Circuit Court to quash the indictment, and to retain the prisoner in custody to answer to another indictment for the same offense.

J. M. Johnston, for the plaintiff.

J. Ryman, for the State.

RITCHHEY v. THE STATE.

ARSON.—An indictment for arson should allege the value of the property destroyed.

AME.—It should also allege that the property burned or set on fire belonged to the person in actual possession in his own right.

ERROR to the *Perry* Circuit Court.

DEWEY, J.—This was a prosecution for arson. The indictment contains two counts. One count charges the defendant,

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Ritchey, with burning the storehouse of the American Canal Coal Company; in the other count, the storehouse is alleged to belong to *Thomas Boyd*, and to be occupied by him. Neither count states the value of the storehouse. Plea, not guilty. Verdict of guilty, and sentence accordingly. A motion in arrest of judgment was overruled, as was a motion for a new trial.

[*169] *The objection urged against the indictment is, that it does not state the value of the property destroyed.

In *England*, there is no need of making such an averment in the indictment, and it is usually omitted in the forms. But, in *England*, the extent of the punishment for arson does not at all depend upon the value of the property consumed or injured. In this State it is otherwise. In addition to imprisonment in the penitentiary, the guilty person is liable to a fine not exceeding double the value of the property destroyed. And this Court has decided that an indictment for a malicious trespass, which, in principle, is not to be distinguished from this case, was bad for not laying the amount of damages done to the owner of the injured property. *The State v. Peden*, 2 Blackf., 371. See, also, *Commonwealth v. Smith et al.*, 1 Mass. R., 245.

It is contended by the plaintiff in error, that the evidence did not sustain either count in the indictment in respect to the ownership or possession of the storehouse therein named. This point it is now unnecessary to investigate. Arson is an offense against possession; and the indictment should aver the property burned, or set on fire, to belong to the person or persons in the actual possession in his or their own right.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the indictment set aside. Cause remanded with instructions to the Circuit Court to quash the indictment, and to retain the prisoner in custody to answer another indictment for the same offense.

C. I. Battell, *C. Fletcher*, and *O. Butler*, for the plaintiff.

A. A. Hammond and *S. Major*, for the State.

Meeker v. Doe, on the Demise of Place.

MEEKER v. DOE on the Demise of PLACE.

EJECTMENT—NOTICE TO QUIT.—In ejectment against a trespasser, notice to quit need not be proved.

SAME—AMENDMENT.—The declaration in such action may be amended, as to the date of the demise, at any time before verdict, provided the amendment do not injure or impose any hardship on the defendant.

[*170] *APPEAL from the *LaPorte* Circuit Court.

SULLIVAN, J.—Ejectment. The lessor of the plaintiff is the mortgagee of *Luther Mann*, who was the owner of the fee at the date of the mortgage. The defendant entered into the consent rule and pleaded not guilty. Trial by the Court and judgment for the plaintiff.

The defendant, on the trial in the Circuit Court, set up no right to the possession. His defense appears to have been, that he had not received notice to quit. The Court decided that notice to quit was not necessary. The Court was right. Notice is necessary only where the relation of landlord and tenant exists. In this case, so far as we can perceive, *Meeker* was a mere trespasser and liable to be ejected without demand or notice.

On the trial, the Court permitted the plaintiff to amend the declaration by altering the date of the demise from the 18th of *August*, 1842, to the 18th of *February*, 1843, which last date was previous to the commencement of the suit, to which the defendant objected and excepted. There was no error in this. The date of the demise as laid in the declaration, is now regarded as merely formal, and may be amended at any time before verdict, provided it do not injure or impose any hardship upon the defendant. *Doe v. Pilkington*, 4 Burr., 2447; 6 Cowen, 590; 7 Cranch, 478; 9 Wheat., 576.

Per Curiam.—The judgment is affirmed with costs.

J. B. Niles, for the appellant.

J. W. Chapman, for the appellee

Pierce and Another v. McConnell and Others.

PIERCE and Another v. McCONNELL and Others.

PARTNERSHIP—ADMISSIONS OF PARTNER.—Although the admission of an individual member of a firm that he is a partner, is evidence to charge himself, it is no evidence of the partnership against any other party.

SAME—PRACTICE.—Assumpsit against A, B, and C, as partners. A pleaded non assumpsit; B appeared and suffered judgment by *nil dicit*; and the writ was returned “not found” as to C. *Held*, that on the trial of the issue between the plaintiff and A, the admissions of B of the existence of the partnership of A, B, and C, were inadmissible.

SAME.—The existence of a partnership, like most other facts, may be proved by one witness; but it is otherwise as to the proof necessary to support an ^[*171] indictment for perjury. To sustain such an indictment, two witnesses, or one witness and corroborating circumstances, are indispensable.

ERROR to the *La Grange* Circuit Court.

BLACKFORD, J.—The plaintiffs in error brought an action of assumpsit against *James McConnell*, Doctor *James McConnell*, and *George D. Parmenter*, late partners, trading under the firm of *James McConnell and Co.* Doctor *James McConnell* pleaded non assumpsit, and made affidavit of the truth of his plea; *James McConnell* appeared and suffered judgment by *nil dicit*; and the writ was returned not served on the other defendant. The issue was tried by a jury, and a verdict and judgment rendered in favour of the defendant who pleaded.

A deposition was offered in evidence on the trial by the plaintiffs, and a part of it suppressed on motion. The suppressed part of the deposition was respecting admissions which the witness had heard *James McConnell* make of the existence of a partnership of the defendants.

The Court instructed the jury as follows: “To entitle the plaintiffs to a verdict in this case, the proof of the partnership between Doctor *James McConnell*, *James McConnell*, and *George D. Parmenter*, at the date of the note given in evidence, as alleged in the declaration, must be such and so clear and certain, that were Doctor *James McConnell* now on his trial on an indictment for perjury for swearing to the truth of his plea,

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this jury upon the same evidence would find him guilty of perjury."

There was no error in suppressing the part of the deposition which we have noticed. Although the declaration or admission of an individual member of a firm that he is a partner, is evidence to charge himself, is no evidence of the fact against any other party. 2 Stark. Ev., 807; *Corps v. Robinson et al.* 2 Wash. C. C. R., 388; *Whitney v. Ferris*, 10 Johns., 66; *Whitney et al. v. Sterling et al.*, 14 Id., 215; *Robbins et al. v. Willard et al.*, 6 Pick., 464. In the case before us, there being a judgment by *nil dicit* against *James McConnell*, and a return of not found as to *Parmenter*, the admissions in question that the three defendants sued were partners, could only affect Doctor *James McConnell*, who had pleaded to the action. But for that purpose, as the authorities cited show, the admissions were inadmissible.

[*172] *The instruction to the jury was wrong. The existence of a partnership, like most other facts, may be proved by one witness; but it is otherwise as to the proof necessary to support an indictment for perjury. To sustain such an indictment, two witnesses, or one witness and corroborating circumstances, are indispensable. *Regina v. Yates*, 1 Carr. & Marshman, 132.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Howe, for the plaintiffs.

D. H. Colerick and *T. Johnson* for the defendants.

NANCE v. DUNLAVY.

ASSIGNMENT OF NOTE.—DEMAND.—If it be the understanding of the assignor and assignee of a promissory note at the time of the assignment, that the assignee need not demand payment of the maker before a certain time, no

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laches can be imputed to the assignee for not commencing suit on the note before that time.(a)

DUE DILIGENCE.—The assignee of such note obtained judgment on it against the maker on the fifteenth of *March*. *Held*, that the assignee could not, during that month, be charged by the assignor with laches for not having taken out execution.

ERROR to the Clay Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed in *March*, 1842, by *Webster Nance* against *Daniel Dunlavy*, to obtain a conveyance of a certain tract of land. The following are the material facts:

The complainant, on the 10th of *April*, 1841, purchased of the defendant a tract of land for \$650, and delivered to him in part payment a horse, saddle, and bridle, valued at \$100. He also executed his note to the defendant for \$119.50, in part payment for the land, payable on the first of *October*, 1841. For the residue of the purchase-money, the complainant assigned to the defendant a note executed by his, the complainant's brother, *James Nance*, which had been for some time due; the complainant saying at the time, that he expected the maker would get money for work done on the public works, and pay the note in the fall. The defendant, at the time of the contract and as a part of it, executed to the complainant a title [*173] bond for *the land, conditioned as follows: "The condition of the above obligation is such, that if the said *Daniel Dunlavy* or his heirs shall well and truly convey to the said *W. Nance* a certain parcel of land, known, &c., (the land is here described,) for and in consideration of \$650; \$200 paid in hand; notes given for the remainder, payment of which is hereby acknowledged; I bind myself, my heirs, &c., to make a general warranty deed for the aforesaid tract of land to the said *W. Nance*, his heirs and assigns forever, so soon as the balance on said *Nance's* part is paid to the said *Dunlavy* or his heirs; then this obligation to be void, else to remain in force. In testimony, &c. *Daniel Dunlavy*, (SEAL.)"

The note for \$119.50 was paid a few days before it became

(a) *Free v. Kierstead*, 16 Ind., 91.

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due. In *August*, 1841, the defendant went to see *James Nance*, the maker of the assigned note, who lived in a distant county, and demanded payment of the note. The maker said he could not then pay the note; but he induced the defendant to believe he would pay it; and the parties agreed to meet again on the business in four or five days, at *Franklin*, in the county where the maker lived. The defendant attended at the place on the day appointed, but the maker failed to attend, and had gone out of the county. The defendant then, viz., on the 22d or 23d of *August*, 1841, gave the note to an attorney to collect, and on the 25th of the same month a suit was commenced on the note in the county where the maker resided. The writ, which was returnable on the first day of the then next *September* term, which commenced on the 14th of *September*, was delivered to the sheriff on the 27th of *August*, and was returned "not found." During said term, an *alias* writ was awarded, and the cause continued. The last-named writ was duly executed, and the plaintiff obtained judgment in the suit on the second day of the next term, viz., on the 15th of *March*, 1842. Sometime in that month, the day of which is not shown by the record, the bill in the cause before us was filed.

The Circuit Court decreed in favour of the defendant.

There is no difficulty in this case. We understand by the condition of the title-bond, that the complainant had [*174] no right *to demand a conveyance for the land until the purchase-money was paid, or, at least, until there was an offer to pay it on receiving the conveyance at the same time, provided no laches could be imputed to the defendant relative to the collection of the assigned note. There has been no offer to pay the assigned note, which was assigned for the greater part of the purchase-money; and the only question, therefore, in the case is, whether at the time the bill was filed, the defendant could be charged with laches respecting the collection of that note? The evidence satisfies us, that it was the understanding of the parties to the contract, that the defendant was not obliged to call on the maker of the assigned note for payment until the fall of 1841; and it is proved that the

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defendant not only called on the maker for payment, but that he actually commenced suit against him on the note, before that time. It is also proved that judgment was recovered in the suit at the first term after the process was served, and the record shows that before a reasonable time for taking out execution had expired, the bill before us was filed. We think, therefore, that there had been no laches by the defendant in his proceeding on the assigned note when this suit was commenced, and that the complainant has no right to a decree.

Per Curiam.—The decree is affirmed with costs.

J. M. Hanna, for the plaintiff.

E. W. McGaughey, for the defendant.

JOHNSTON and Another v. WATSON.

MORTGAGE—DISCHARGE OF JUDGMENT.—A note for the payment of money, and a mortgage on real estate to secure its payment, were assigned, and the assignee obtained judgment at law on the note against the maker. The mortgaged premises were afterwards sold on execution on the judgment to the judgment-creditor. *Held*, that the purchase was a discharge of the judgment to the value of the mortgaged premises.(a)

ERROR to the *Vigo* Circuit Court.

SULLIVAN, J.—Bill to foreclose a mortgage. The bill states that *Johnston* purchased from one *Welch* a lot in the town of **Terre Haute*, and, in part payment of the price, assigned to him a note on one *A. C. Conn* for the sum of \$720.43, secured by a mortgage executed by *Conn* to *Johnston* on a lot in the town of *Eugene*. *Johnston*, further to secure *Welch*, executed to him a mortgage on the lot purchased from him. The mortgage contained a provision, that if *Welch* should be unable to collect *Conn*'s note, after having prosecuted a suit for the same with due diligence both at law

(a) See *Foltz v. Peters*, 16 Ind., 244.

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and in equity, then the said mortgage should be in full force and virtue against *Johnston* for so much of said note as should remain unpaid. *Welch*, subsequently, for a valuable consideration, assigned the *Conn* note to *Watson*, and delivered to him the mortgages of *Conn* and *Johnston* respectively. *Watson* sued *Conn* on the note at law, and obtained a judgment against him, and sold on execution, amongst other property, the lot in the town of *Eugene* which was mortgaged to secure the debt, and at such sale became himself the purchaser. The amount made from the sale of all of *Conn's* property, real and personal, was between \$400 and \$500, and it is to recover the balance claimed to be due to *Watson* that this bill is filed for a foreclosure and sale of the lot in *Terre Haute* mortgaged by *Johnston* to *Welch*, and by the latter assigned to *Watson*. The bill charges that *Burton* is a purchaser of the *Terre Haute* lot from *Johnston* with full knowledge of the foregoing facts. A decree was taken against *Burton* by default. *Johnston* answered the bill, admitting the material facts stated in it, but denying the complainant's equity. Depositions were taken to prove the value of the *Eugene* lot, but the testimony is loose and unsatisfactory. At the final hearing the Court decreed in favour of the complainant.

The simple question in the case is, whether the purchase of the *Eugene* lot by *Watson*, on his judgment against *Conn*, is a discharge of that judgment to the value of the lot. *Watson* was the assignee of *Welch*, who was the assignee of *Johnston*, the original mortgagee, and if the purchase of the lot by *Johnston* on a judgment obtained by him against *Conn* on the same note would have had that effect, it must have the same effect on a purchase under a judgment obtained by his assignee. As this Court has heretofore examined and [*176] *decided the question, it is not necessary to discuss it again. In the case of *Murphy v. Elliott*, 6 Blackf., 482, it was decided that a mortgagee who purchases the equity of redemption at sheriff's sale on execution, thereby extinguishes the mortgage-debt to the extent of the value of the mortgaged premises beyond the amount bid for it. The prin-

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ciple there decided is strictly applicable to the case under consideration.

This bill is filed to recover from *Johnston* the amount which the complainant as assignee failed, as he alleges, to make out of *Conn.* The case of *Murphy v. Elliott, supra*, shows that he is only entitled to recover the balance due after deducting the amount made by the sale of the personal property of *Conn.*, and the value of the lot at the time of the sale. As we can not correctly ascertain its value, the cause must be returned to the Circuit Court for further proceedings.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

C. W. Barbour, for the plaintiffs.

A. Kinney and *S. B. Gookins*, for the defendant.

SAMPSON v. GRIMES.

SUBSCRIBING WITNESS.—The subscribing witnesses to a deed are the proper persons to prove its execution, if they are within the jurisdiction of the Court and competent to testify.

RENTS AFTER SALE.—If real estate occupied by a tenant be sold, the vendee is entitled to the rents which accrue after the sale, unless they have been paid, before notice of the sale, to the vendor.

ERROR to the *Carroll* Circuit Court.

SULLIVAN, J.—Assumpsit for the use and occupation of a ferry with its appurtenances across the *Wabash* river near *Delphi*. The declaration contained one special and two common counts. The defendant pleaded non assumpsit. Verdict and judgment for the plaintiff.

On the trial, *Grimes*, the plaintiff below, offered in evidence a title-bond for the land adjoining the ferry executed by *James H. Stewart*, the patentee of the land, dated *March* the 9th, 1836; also a deed in fee-simple from *Stewart* for the

[*177] *same land, dated *November* the 9th, 1838; and offered to prove their execution by said *Stewart*. 22

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appeared that there were subscribing witnesses to both instruments living within the reach of the process of the Court, and competent to testify in the cause. The defendant thereupon objected to *Stewart* as a witness to prove the execution of the bond and deed, but the objection was overruled and he was permitted to prove their execution. This was erroneous. The subscribing witnesses, all of whom it appears were living and within the jurisdiction of the Court, and competent to testify in the cause, were the proper persons to prove the execution of the papers offered in evidence *Bowser v. Warren*, 4 Blackf., 522.

The defendant proved on the trial that during the tenancy, the plaintiff had conveyed the lands adjoining the ferry with their appurtenances, which included the ferry, in fee-simple to one *Henry B. Milroy*. The following instruction to the jury among others, was thereupon given by the Court, viz.: The transfer of the land by *Grimes*, at any time subsequent to the lease, will not affect the lease; and the defendant can not set up the transfer as a defense without showing that he was injured by it, and that the purchaser either claimed or received rent.

At common law, when lands occupied by a tenant were conveyed, it was necessary in some cases, before the grantee could demand rent, that the tenant should attorn to him, and thus create the relation of landlord and tenant. An attornment, however, was not necessary in those cases where the party acquired title by matter in law, as heir by descent, husband by marriage, &c. Nor after the statute of uses, by virtue of which the possession was immediately executed to the use, was attornment necessary in conveyances under that statute. By the statute of 4 and 5 *Anne*, c. 16, the necessity for attornments is dispensed with in *England*, and the law now stands in all cases as it did in the cases above referred to before the statute was passed, that upon the execution of the deed containing the grant, the grantee is, *ipso facto*, complete owner of the land, and entitled to all the rents, issues, and profits, that accrued after he acquired title to the premises. In

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this State, the same rule applies as did in *England* [*178] *under the statute of uses. The grantee becomes a perfect landlord without the knowledge or acquiescence of the tenant.

There are cases, however, in which a recognition of the grantee's title by the tenant is essential to create the relation of landlord and tenant. As where the tenant is in possession by virtue of a lease made subsequently to the conveyance, he is a trespasser merely, and can not be held accountable as a tenant, unless he agrees to pay rent and thereby becomes the tenant of the new owner.

It is not necessary that there should be a demand of rent of the tenant by the grantee, to create between them the relation of landlord and tenant. The landlord's right to the rent is complete without it, and he can at all times recover it, unless the tenant pay the rent to his original landlord before he receives notice of the transfer. In such case, the tenant having paid in good faith will be protected, and the only necessity for notice or demand from the new landlord, is to avoid the effect of such payment. *Watts v. Ognell*, Cro. Jac., 192; *Birch v. Wright*, 1 T. R., 378; *Lumley v. Hodgson*, 16 East, 99; *Brown v. Storey*, 1 Mann & Grang., 117, and note a; *Agar v. Young*, 1 Carr. & Marsh., 78. The instruction of the Court was therefore erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

D. Mace, for the defendant.

SHAEFFER v. SLEADE and Others.

FALSE REPRESENTATIONS.—When a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement or motive to the act of the other party, and by which an undue

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advantage is taken of him, is regarded as a fraud against which equity will relieve(a)

SAME.—At law, an action may be maintained for false representations, made by a vendor to a purchaser, of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured.

RESCISSION OF CONTRACT.—Applications to a Court of chancery for the exercise of its jurisdiction to rescind a contract are addressed to the
[179] sound discretion of the Court; but such discretion must be exercised in conformity with established principles.

SAME—STATUTE QUO.—A contract will not in general be rescinded when the contracting parties can not be placed in the identical situation which they occupied when the contract was made. And even when they can be so placed, the contract will not be rescinded, if the application to rescind be not made within a reasonable time.(b)

CHANCERY PRACTICE.—In a chancery suit before the Supreme Court on a writ of error, the Court may render such a decree on the merits as the justice of the case requires.

ERROR to the *Clark* Circuit Court.

SULLIVAN, J.—The proceedings in this case commenced with a bill in chancery to foreclose a mortgage filed by *Shaeffer* against *Carr*, the mortgagor, *Prather*, a junior mortgagee, and *Matlack* to whom the prior mortgage had been assigned in trust and for the use of the complainant. Answers were filed which admitted the execution of the mortgage by *Carr*, and that the debt which it was given to secure was unpaid; that the mortgage had been assigned to *Matlack* in trust for the complainant; and that it was prior in date to the mortgage held by *Prather*. At this stage of the cause, *Sleade*, who had assigned to *Matlack* the debt against *Carr* and the mortgage by which it was secured, filed a petition setting forth that the assignment of the mortgage had been obtained from him by fraud; and praying that he might be made a defendant. The bill was amended by making him a defendant; whereupon he filed his answer to the complainant's bill, and his cross-bill making *Shaeffer* and *Matlack* defendants to it.

The answer and cross-bill of *Sleade* set forth the following facts, viz., that in *January* or *February*, 1839, *Matlack* arrived

(a) *Siercking v. Litzler*, 31 Ind., 13; 17 Id., 272; 13 Id., 277; 9 Id., 572; 6 Id., 183; Id., 219.

(b) *Pitten v. Stewart*, 24 Ind., 332; 16 Id., 170; 8 Blackf., 407.

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at *Jeffersonville*, having in his possession a barge containing a portrait of General *Washington* and fifty-six figures, representing the signers of the Declaration of Independence, which *Matlack* was exhibiting to the public as "The grand national exhibition of the signers of the Declaration of Independence of the *United States*;" that *Sleade* visited the place of exhibition, and while there *Matlack* was prodigal in his statements of the great value of the property, and perceiving that the defendant was of a sanguine temperament, and that he had been struck with the singularity of the figures, continued his fraudulent [*180] misrepresentations of the value of the property for the purpose of further exciting and duping him; that *Matlack* falsely represented himself to be the owner of one-half of said property, and that the other half was owned by persons resident east of the mountains; that the owners had amassed handsome fortunes from the profits of said exhibition in the Eastern States; that at *Philadelphia* it had yielded more than \$200 daily, at *Pittsburg* a large amount, and at *Cincinnati* nearly \$2,000. He further states that being so deceived by the representations of *Matlack*, he determined to purchase the barge and its contents if he could be satisfied of the durability of the material of which the figures were made and the validity of the title; that he communicated his intention to *Matlack*, who falsely and fraudulently represented the title to be good, and that the figures were made of a superior composition, having no wax in them, and could not be affected by heat or cold. The defendant alleges that all the foregoing representations of *Matlack* as to the ownership of the property, the composition of the figures, the profits derived from the exhibition of them, &c., were false and made to defraud him, and that being so deceived he purchased the property for the sum of \$8,000; that he has paid part of the purchase-money, to wit, the sum of \$2,000 in cash; that he executed two notes, one for the sum of \$1,000, and one for the sum of \$900, in part consideration of said purchase, both of which remain unpaid, and for the residue assigned said note and mortgage of the defendant, *Carr*, for the sum of \$4,000 and the interest thereon, mak-

ing altogether the sum of \$8,000. He alleges an offer to return the property, and prays that the contract may be rescinded.

Matlack's answer denies the fraud set up by *Sleade* in his cross-bill. It admits the sale of the barge and its contents on or about the 4th of *February*, 1839, to *Sleade* by *Matlack* for the sum of \$8,000, to be paid as set forth in *Sleade's* cross-bill, and says he sold as the agent of *Shaeffer*. The respondent admits that he told *Sleade*, at the time of the sale, that he was part owner of said property, believing it was proper for him to do so because he was verbally authorized by *Shaeffer* [*181] either to sell the property or to take an interest *in it; that immediately on effecting the sale he wrote to *Shaeffer* informing him of it, and asking him to ratify it and give to the purchaser a title, which *Shaeffer* did, whereby *Sleade* acquired a full and complete title to the property. He denies having represented to *Sleade* that there was no wax in the composition of the figures; he says he did not know himself what the composition was, and so stated to *Sleade*; and he further denies that he represented said figures as capable of enduring any degree of heat or cold, but said they would stand the heat or cold of the climate. He says that "the exhibition" was of great value; that large profits had been derived from it; and that he so stated in general terms, but not to defraud *Sleade*, &c. He denies having any interest in the suit, and prays to be dismissed, &c.

Shaeffer, by his answer, admits that *Matlack* was his agent and sold by his authority; that on being informed of the sale by *Matlack*, and being requested to ratify it, he came to *Louisville* to complete it in good faith; that he met *Sleade*, who had had the possession of the figures about one month, and the contract was ratified, the bond given by *Matlack* for a title was taken up, and a complete title made by respondent to *Sleade*, who has retained the undisturbed possession of the property ever since. He further states that the original cost of the figures was about \$6,000; that large profits had been derived from exhibiting them in various places; that they were of

great value; and that he had been offered for the collection of figures real estate valued at \$12,000; that "the exhibition" had yielded large profits to the respondent, and might also have yielded large profits to *Sleade* if it had been properly managed; that the figures were of a composition which neither the heat of summer nor the cold of winter would affect, &c. He denies that at the time he executed a title to *Sleade* for the property, he made any false or fraudulent representations as to its value or the profits derived from its exhibition, or of the composition of the figures; that *Sleade* having been in possession of them, and having exhibited them for more than a month was fully aware of their composition and of its durability, and expressed no doubts about either to the respondent.

[*182] He *denies that *Sleade* has placed himself in a condition to rescind the contract, &c.

Replications were filed and a volume of testimony was taken. The cause was submitted to the Court on bill, answers, replications, exhibits, and depositions, and the Court decreed a rescission of the contract; the assignment of *Carr's* note and mortgage was set aside on the ground of fraud, and *Shaeffer* enjoined from further proceedings against *Sleade*, &c.

The decision of this case turns, we think, upon two questions: 1, Whether there were such false and fraudulent representations by *Matlack* as to the durability of the figures, and as to the profits derived from their exhibition, as to impose upon *Sleade* and induce him to make the contract set out in the bill; and, 2, Whether *Sleade*, within a reasonable time after he had an opportunity of discovering the imposition, returned or offered to return the property. To determine those questions we must advert to the testimony.

A witness, *Boyd*, deposes that about the 3d of *February*, 1839, he was on board of the barge containing the figures, and heard *Matlack* and *Sleade* in conversation about the purchase of the figures. In that conversation, *Sleade* inquired whether the figures were "well received," and what profits were derived from the exhibition of them. *Matlack* represented them as being well received and liberally patronized. Another witness,

A. P. Sleade, a son of the defendant, states that he was present at the time the contract mentioned in the cross-bill was made; while the parties were contracting, *Sleade* inquired of *Matlack* whether the composition was not chiefly of wax? *Matlack* replied that wax formed no part of the composition; that it was of a superior kind that would not be affected by heat or cold. He further states, that while *Matlack* was trying to sell the figures, he represented the receipts arising from the exhibition of them at *Philadelphia* as averaging \$300 a day for nine months; that at *Pittsburg* they averaged from \$75.00 to \$100 per day for two weeks; and that at *Cincinnati* between \$1,000 and \$2,000 were received; that the profits of "the exhibition" would pay for the property in twelve months. The reason he gave for wishing to sell was, that he was afraid to risk his health during the summer season in a southern climate. A *third witness, *Warren*, who was employed as a hand on the boat, swears that he heard *Matlack*, at several times, speak of the receipts derived from the exhibition of the figures, and that he always exaggerated the amount received; that at *Cincinnati* they exhibited eleven days, and the receipts did not exceed \$100. *W. P. Thomasson*, an attorney of *Louisville*, drew the contract between *Matlack* and *Sleade*, and he swears that before it was executed, *Matlack* represented to *Sleade* that wax formed no part of the figures. There is other testimony to the same effect, and there is much to show the extreme desire of *Matlack*, and other agents of the plaintiff, to sell the property even at a sum less than \$3,000. The testimony also proves that the statements of *Matlack*, as to the favour with which "the exhibition" was received by the public, and the revenue derived from it, were extravagant, and made to dupe the credulous and unsuspecting; and there is abundant proof upon the record that the figures, on being subjected to chemical analysis, were found to contain a large proportion of wax.

If this were a case in which the means of information relative to the value of the property sold had been equally accessible to both the parties, and they had dealt upon equal terms, a

Court of equity would not interfere with the contract. Such, however, is not the fact. The value of the figures as a source of revenue was entirely unknown to *Sleade*, while, on the other hand, it was well known to the owners. It should not have been misrepresented. The value of the figures as such depended much, indeed entirely, on public favour and public patronage. Of the patronage bestowed, *Sleade* had no means of information except as he derived it from the plaintiff in error or his agents.

When a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement or motive to the act of the other party, and by which an undue advantage is taken of him, is regarded as a fraud against which equity will relieve. *Laidlaw et al. v. Organ*, 2 Wheat., 178, 195; *Evans v. Bicknell*, 6 Ves., 174, 182, 192; *Phillips v. Duke of Bucks*, 1 Vern., 227; 1 Fonb. Eq., b. 1, c. 2, s. 8.

[*14] * At law, an action may be maintained for false representations, made by a vendor to a purchaser, of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured. As in the case of *Dobell v. Stercus*, the facts were that the defendant kept a public house, and was possessed of a lease of the house for a certain term of years, &c., and the plaintiff being in treaty with the defendant to purchase his interest in said house, the defendant falsely represented to the plaintiff that the receipts for the spirits sold in said house had been, and then amounted to, the sum of £160 per month; that the quantity of porter sold in the house amounted to seven butts per month; that two rooms in the house rented for £27 *per annum*, &c.; by means of which false representations, the plaintiff was induced to buy at and for a certain sum, &c. The Court decided that an action would lie, and adopted the language of Lord *Holt*, who had said in a former case that “if a vendor gives in a particular of the rents, and the vendee says he will trust him, and inquire no further, but rely upon his particular, then, if the particular be false, an

action will lie." 3 Barn. & Cress., 623; *Lysney v. Selby*, 2 Ld. Raym., 1118; 3 Ves. & Beam., 108.

It is wholly immaterial in this case to inquire whether *Matlack* intentionally misrepresented the amount of profits derived from exhibiting the figures or not, because if his misrepresentations were innocently made by mistake, they operated as a surprise and imposition on *Sleade*, as much as if they had been made through design. *Ainslie v. Medlycott*, 9 Ves., 21; *Pearson v. Morgan*, 2 Bro. Ch. Rep., 388; *Burrows v. Lock*, 10 Ves., 470.

Although we are of opinion that an undue advantage was taken of *Sleade* by deceiving him in regard to matters which no vigilance on his part could detect, yet we think the contract can not be rescinded. Applications to a Court of chancery for the exercise of its jurisdiction to rescind a contract are, it is true, addressed to the sound discretion of the Court; but that discretion must be exercised by the Court, either in granting or refusing the relief prayed, in conformity with established principles. It is a rule of equity jurisprudence that a contract will not in general be rescinded, where the contracting parties can not be placed in the identical situation [*185] which they occupied, and can not be made to stand upon the same terms which existed when the contract was made. If the parties can not be so placed, a Court will not rescind the contract, nor then, if the application to rescind be not made within a reasonable time.

It appears from the testimony in the case, that the sale was made by *Matlack* to *Sleade* on the 4th of *February*, 1839, and that *Sleade* took the figures immediately into his possession and conveyed them to *Louisville*, where he exhibited them until the 4th of *March* following, when the plaintiff in error ratified the contract made with him by *Matlack*, and gave him a title to the property. At the period last named, *Sleade* expressed no desire to rescind the contract. He continued to use and exhibit the property at *Louisville*, and *St. Louis*, and intermediate places, until in the month of *November* following, almost ten months after the date of the purchase, and not until then does

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he offer to return the property, or propose to rescind the contract. It furthermore appears, that the property can not be restored in the same condition in which it was at the time of the contract, on account of some part of it being mutilated and disfigured by experiments made to ascertain the ingredients of which it was composed. Another reason why the contract should not be rescinded on the application of *Sleade* is that he has rendered no account of the receipts during the time the figures were in his possession, nor are there any means of ascertaining satisfactorily what they amounted to. For these reasons a rescission of the contract can not be decreed.

It is competent for this Court, under the circumstances, to render such a decree in the premises as the justice of the case requires. We are of opinion that a decree must be rendered in favour of *Shaeffer* for the value of the property, subject to such payments as *Sleade* has made. This part of the case is attended with some difficulty, as we have to arrive at the value amidst a mass of conflicting testimony. The admission of *Shaeffer* is that the original cost of the figures was \$6,000. There is proof that he had been offered for them when they were new, and before they had been brought west of the mountains, at one time, property valued at \$12,000, at [*186] another time property valued at \$7,000; *that afterwards, while on the borders of this State, his agent had been offered for them and the barge in which they were deposited \$2,500 in cash, and some real estate, the true value of which is not ascertained, but was probably about \$2,000: that shortly before the last mentioned offer, the barge and figures had been offered for \$3,000; and one witness swears that the figures were worth about \$2,800. With the foregoing proof before us, we have concluded to fix the value of the property sold at \$4,500. *Sleade* has paid the sum of \$2,000, for which he is entitled to a credit, and for the residue a decree must be entered in favour of *Shaeffer*.

Decree accordingly.

J. G. Marshall and *R. Crawford*, for the plaintiff.

S. C. Stevens, for the defendants.

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WEINZORPFLIN v. THE STATE.

CRIMINAL LAW AND PRACTICE.—The joinder of counts for separate felonies in an indictment, is a good cause for quashing the indictment on motion made before pleading to issue. But the refusal of the Court in such case after plea, to compel the prosecuting attorney to elect on which count he will proceed, is not error.

SAME—INDICTMENT.—A caption of an indictment which shows the indictment to have been found by a grand jury at a Circuit Court, held, at, &c., on, &c., is sufficient. It need not specify the qualifications of the jurors, nor allege them to be good and lawful men.^(a)

SAME—ONCE IN JEOPARDY.—If a person has been once put on his defense on a legal indictment before a competent jury, and the jury has been unnecessarily discharged, such discharge is equivalent to an acquittal of the defendant.^(b)

SAME—VERDICT.—A verdict finding the defendant guilty on one of several counts of an indictment, and saying nothing of the other counts, is, as to such other counts, equivalent to an express finding of not guilty. A judgment may be rendered on such verdict; and the proceedings will be a bar to a future prosecution for any of the offenses charged in the indictment.

SAME—PRACTICE. The entry, after such judgment, of a *nolle prosequi* of the counts concerning which the verdict is silent, is a nullity.^(c)

RAPE.—If the description of rape in an indictment leave out the word “unlawfully,” but be in accordance with the common law definition of the offense, it is sufficient.

NEW TRIAL.—A new trial may be granted to a defendant in any criminal case.

IMPEACHMENT OF WITNESS.—A witness can not be impeached on the ground that he had made previous statements inconsistent with his testimony, until he has been asked whether he had made such statements.

[*187] **NEW TRIAL—PRACTICE.**—The refusal of the Circuit Court to grant a new trial, where the question depends merely on the credibility of a witness, will not be considered erroneous.^(d)

ERROR to the *Gibson* Circuit Court.

DEWEY, J.—This was an indictment found at the *Vanderburgh* Circuit Court, against the plaintiff in error, and, by a change of venue, tried in the *Gibson* Circuit Court. The caption

(a) *Stone v. The State*, 30 Ind., 115.

(b) *State v. Walker*, 26 Ind., 346; 14 Id., 139.

(c) *Hagworth v. The State*, 14 Ind., 590.

(d) *Harris v. Ruppel*, 14 Ind., 209; 9 Id., 258; Id., 264; 7 Id., 326.

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shows that the indictment was found by a grand jury impaneled and sworn at the Circuit Court of the former county, (naming the judges,) at its *September* term held at, &c., on, &c. The indictment contains three counts. The first count alleges that the plaintiff in error, on, &c., at, &c., “with force and arms, in and upon one A. M. S., the wife of one M. S., of, &c., then and there being, violently and felonously did make an assault, and her the said A. M. S., then and there, feloniously did ravish and carnally know, by force and against her will, contrary to the form of the statute,” &c. The second count is for an assault and battery, and the third count for an assault, upon the same person, with intent to commit a rape. The defendant pleaded not guilty. It appears by a statement of the clerk of the Circuit Court, but not by a bill of exceptions, that the defendant, after he had pleaded, moved the Court to compel the prosecuting attorney to elect one count on which he would try the defendant, and that the motion was overruled. The jury found the defendant guilty upon the first count of the indictment, and awarded his punishment to be confinement for five years, at hard labour, in the State prison. Motions for a new trial and in arrest of judgment were overruled; and sentence was passed according to the verdict.

Neither the verdict, nor the judgment of the Court, mentions the second or third counts. As to these counts, the prosecuting attorney entered a *nolle prosequi* after the rendition of the judgment. It appears by one bill of exceptions, that, on the trial, the counsel of the defendant proposed to ask a witness two questions as to what the principal witness for the State had told him. The object of these questions was to impeach the credit of the witness for the State, by showing that she had made statements inconsistent with her testimony. The [*188] Court, at first, refused to suffer either of the *questions to be put; but it appears by another bill of exceptions that one of them was afterwards asked and answered. The matters alleged as errors are,

1. The refusal of the Court to compel the prosecuting attorney to elect the count on which he would try the defendant.

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2. The refusal of the Court to arrest the judgment, which it is contended should have been arrested for the following reasons: 1, Because it does not appear that the indictment was found by legally qualified grand jurors impaneled and sworn in open Court; 2, Because the verdict was insufficient; and, 3, Because the first count of the indictment (the only one named in the verdict) was defective.

3. The refusal of the Court to grant a new trial, which it is alleged should have been granted for two reasons: 1, Because the Court did not suffer the question, having for its object the impeachment of the State's witness, to be put; and, 2, Because the verdict was not authorized by the evidence.

The question raised by the joinder of counts is not properly before us. The statement of the clerk, that a motion was made to compel the prosecuting attorney to elect, is no part of the record. But as this point, had the record contained it, would have had no effect on the result of the case, we have concluded to consider it. The law is well settled, that distinct and separate felonies can not regularly be joined in the same indictment; and such joinder is good cause to quash an indictment, on motion made before the defendant has pleaded to issue. But if the objection be not urged until after plea, it lies in the discretion of the Court whether to compel the State to elect on which count to try the defendant or not; and it is no ground of error if the Court refuse to compel the election, though the felonies joined may be punished with different degree of severity. 1 Chitt. C. L., 253; *McGregg v. The State*, 4 Blackf., 101. Under the laws of this State, all crimes punishable by confinement in the penitentiary—a punishment not only affecting personal liberty but one infamous in its nature—must be viewed as felonies in contradistinction to misdemeanors. The offenses charged in the indictment under consideration all subject the offender to such imprisonment, that in the first [*189] count to a *longer, and those in the second and third counts to a shorter term. We could not, therefore, pronounce the refusal of the Court to compel the prosecuting attorney to make his election to be erroneous.

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The objection that the record does not show a regularly impaneled and sworn grand jury can not be sustained. The principal object of the caption is to show that the indictment was found in a Court of competent jurisdiction. The caption in this case states that the grand jury impaneled and sworn *at* the Circuit Court of, &c., at its *September* term held, &c., found the indictment. This is equivalent to saying the jury was impaneled, &c., in open Court; and as the Circuit Court possesses extensive and general criminal jurisdiction, it was not necessary to specify the qualifications of the jurors, or to allege that they were good and lawful men. All this must be presumed. *Beauchamp v. The State*, 6 Blackf., 299.

The next question arising under the motion in arrest of judgment is important, and one of some difficulty. Is the verdict, convicting the defendant on the first count of the indictment, and taking no notice of the second and third counts, a valid verdict?

The plaintiff in error contends that, as he was put upon his trial on all the counts, he was entitled to have them all tried, and to have a verdict and judgment which should bar a future prosecution for the same offenses. Such was his right, and if the proceedings have not that effect, the judgment must be reversed. It was formerly maintained in *England* that a jury, when once sworn in a criminal case, at least in a capital one, could not be discharged without returning a verdict. 1 Inst., 227, *b*; 3 Id., 110. It would seem to follow from this doctrine that, should the jury be discharged, the defendant could not be again tried for the same offense. If there is, at the common law, any distinction in this respect between capital and other criminal cases, such a distinction does not exist in this State. Our constitution, article 1, section 13, provides that no accused person, in a criminal prosecution, "shall be twice put in jeopardy for the same offense." This language embraces all indictments, whether for capital crimes or otherwise. But the rule of law, as laid down by Lord *Coke*, has not been invariably adhered to. Many cases, both [*190] in this country and *in *England*, have occurred in

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which, either by the consent of the defendant or from strong necessity, the jury have been discharged without rendering a verdict, and the defendant again put upon his trial. It is evident that unless such were the law, the guilty would often escape punishment, and public justice be defeated. It is clear, however, that none of these exceptions embraces the cause under consideration. Here there was a trial; and if the jury did not render a valid verdict, the omission was not occasioned by the consent of the defendant nor by the necessity of the case.

There have been several decisions bearing closely upon this cause, but none of them are precisely in point. Their analogy is, however, we think, strong enough to decide the question.

In the case of *The People v. Barrett et al.*, 2 Caines' Rep., 304, the prosecuting attorney, finding his evidence would not support the indictment, moved the Court for leave to withdraw a juror; the motion was granted. The defendants were afterwards tried and found guilty. The Court arrested the judgment, on the ground that the insufficiency of the State's evidence to convict was not a good cause for withdrawing a juror, and did not present a case justifying the subsequent trial of the defendant. Had there been a new indictment found, and the defendant put upon trial on that, instead of the old one, the same matter which operated in arrest of judgment must have constituted a good bar in the form of a plea.

In the case of *The People v. Goodwin*, 18 Johns., 187, it was held that discharging the jury because there was no prospect of their agreeing during the term of the Court, did not exonerate the defendant from a trial by another jury. Though this decision was made to rest on the ground that the defendant had not, in a legal sense, been put in jeopardy by the first attempt to try him because no verdict was rendered, yet the case of *The People v. Barrett et al.* was quoted with approbation; and the withdrawing a juror under the circumstances of that case was viewed as "equivalent to an acquittal."

The Supreme Court of *Pennsylvania* held that the inability of the jury to agree did not present such a case of necessity

as would authorize the Court to discharge them, and that discharging them for that reason exempted the defendant [*191] from liability to a subsequent trial. *Commonwealth v. Cook*, 6 Serg. & R., 577. The same Court also held, that, when the jury has been unnecessarily discharged, that matter may be pleaded in bar of another trial. *Comm v. Cluc*, 3 Rawle's R., 501. It is as to the effect of an unnecessary discharge of the jury that we quote the two last cases, and not as to what constitutes a good cause of discharging them. So, also, in *North Carolina*, the discharge of the jury without necessity acquits the prisoner, and on the ground that he has been once put in jeopardy. *State v. Garrigues*, 1 Hayw., 241. *The matter of Spier*, 1 Dever., 491.

The case of *The United States v. Shoemaker*, 2 McLean's R., 114, was an indictment against a mail-carrier, for feloniously taking letters, containing money, out of the mail. The defense set up was, that the defendant had been previously indicted for the same offense; that, in the first prosecution, after the jury was sworn and evidence given, the district attorney entered a *nolle prosequi*, whereupon the jury was dismissed, and a judgment that the defendant go without day was rendered. The Court held that these proceedings barred the second prosecution.

The Courts of *Pennsylvania* and *North Carolina* differ from those of *New York* as to the meaning of the maxim and constitutional provision, that a man shall not be put twice in jeopardy for the same offense. The latter Courts understand it to mean, that he shall not be twice *tried*; and they view the "test, by which to decide whether a person has been once *tried*," to be the plea of *autrefois acquit*, or *autrefois convict*. The former Court consider the hazard, danger, or peril in which a man shall not be twice placed, as having been once incurred by giving him in charge, on a legal indictment, to a regular jury, which has been unnecessarily discharged without rendering a verdict. And this is the interpretation which we give to that clause of our constitution, which privileges an accused person from being "twice put in jeopardy for the same offense."

It is obvious that the rule of construction and the "test," adopted in *New York*, sustain the Court in the conclusion to which they arrived in the case of *The People v. Goodwin*, namely, that in a case where the jury had been [*192] necessarily discharged, the defendant might be tried by another jury. But it is equally clear, that the same interpretation and test will not support the decision in *The People v. Barrett et al.*, that the defendant could not be tried after the jury had been unnecessarily discharged; for the facts, though admitted to be "equivalent to an acquittal," would not sustain the technical plea of *auterfoits acquit*. Some other rule of interpretation and test must be sought to justify these two decisions, both of which are held by the Courts of *New York*, and by us, to be correct. The principle of construction adopted by the Courts of *Pennsylvania* and *North Carolina*, and also by the Circuit Court of the *U. S.* in *Shoemaker's* case, will solve the difficulty. That principle, as before observed, is, that a man who has stood upon his defense on a valid indictment, before a legal jury which has been discharged without good cause, has incurred the first peril, and shall not incur the second by a subsequent trial. A modification of the usual plea of *auterfoits acquit* must be the consequence of establishing this doctrine, so as to adapt the plea to the facts; or if the plea remain unaltered, the rules of evidence must so far yield as to allow an averment of an actual acquittal by a verdict, to be proved by a record showing a virtual acquittal by the unnecessary discharge of a jury without a verdict. The latter course would seem to be sanctioned by the case of *The People v. Barrett et al.*, 1 Johns. R., 66.

In the case of *The United States v. Keen*, 1 McLean's R., 429, the indictment contained five counts. The jury found the defendant guilty on the four last counts, but said nothing as to the first. The Court allowed the district attorney to enter a *nolle prosequi* as to the first count, and rendered a judgment on the verdict. The validity of the verdict was questioned by the defendant on a motion for a new trial, and

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to set aside the verdict, for irregularity. The Court, in sustaining the verdict, founded the decision on the ground, that the entry of the *nolle prosequi* could not prejudice the defendant, as, if his motion for a new trial prevailed, the entry might be afterwards made at the option of the district attorney; and on the ground, that the Court judicially knew that the five counts were for the same offense, varied so as to meet the proofs, and that consequently a conviction on one [*193] count was *a conviction on all, and would bar a future prosecution for the same offense. It appears to us that if any difficulty existed in that case, the *nolle prosequi* did not remove it. If that entry could have any effect at all, it would have been to subject the defendant to another prosecution for the crime charged in the discontinued count. But it could not have that effect, if, as the Court decided, the offense charged in that count was embraced in the conviction on the other counts. The verdict was as complete and valid before as after the entry of the *nolle prosequi*; and it was valid because it was virtually a finding on all the counts.

In the cause before us, we can not judicially know that the offenses charged in the three counts constituted but one transaction. But we can easily conceive that the felonious intent charged in the two last counts was merged in the actual perpetration of the crime alleged in the first. And we have no doubt, that so strong is the presumption of the intention of the jury to acquit on the second and third counts, that the Court was authorized so to enter the verdict. And we can not but think there was great remissness, both in the prosecuting attorney and the Court, in suffering the verdict to be entered of record in its present form. That the verdict was amendable, so as to make it express the real intention of the jury, is fully established by the case of *Reg. v. Virrier*, 12 Ad. & Ell., 317. And that case has a bearing upon the validity of the verdict as it stands. The case was an indictment for perjury, containing three distinct assignments of perjury. The jury found the defendant not guilty on the first assignment, and guilty on the second, saying nothing as to the third. There was a motion to

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amend the verdict, which, for reasons peculiar to that case, was overruled; but the Court refused to arrest the judgment on the verdict as it stood. Distinct assignments of perjury in the same count, are strongly analogous to the joinder of several counts in one indictment. If any one of the assignments, or counts, is good, though the others are bad, a general verdict is valid. It appears to us to be as necessary that a verdict should find as to all the assignments in a count for perjury, as it is that it should find as to all the counts in an indictment. There

is also some analogy to the cause under consideration [*194] in an indictment for a crime which *includes one of lower degree, as murder, burglary, &c., and on which the jury has found a verdict of guilty of the lower offense, but said nothing as to the higher. Such a verdict was formerly held to be insufficient, but is now considered good. 1 Chitt. C. L., 641.

In view of these authorities, and upon principle, we have come to the conclusion that the defendant has been once put in jeopardy, within the meaning of the constitution, on the two last counts of the indictment; that, as to those counts, the proceedings against him are equivalent to an express verdict of not guilty; that he can plead these proceedings in bar of a future prosecution for the offenses or either of them if they be different, charged in the two last counts; and, therefore, that this verdict must stand as it would have stood, had it, in addition to the finding of guilty on the first count, contained an express finding of not guilty on the two last counts.

The *nolle prosequi* of the second and third counts was a mere nullity.

The only remaining inquiry, under the motion in arrest of judgment, is as to the validity of the first count of the indictment.

The objection urged against that count is, that it does not describe the offense in the language of the statute on which it is founded.

The words of the statute are, "shall unlawfully and forcibly have carnal knowledge of a woman against her will." The

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terms of the indictment are, "feloniously did ravish and carnally know by force and against her will." There is not the slightest shade of difference in the sense of these two sets of words, except what arises from the different tenses; nor does the indictment depart widely from the language of the act. We are aware that great verbal nicety is required in describing statutory offenses; and here again we regret that the prosecuting attorney did not pay more attention to the statute, while he adopted the common law definition of the offense. *Chitty* says: "It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it." 1 Chitt.

[*195] C. L., 281. This, we conceive, has been *substantially done in the present instance. The same author adds:

"And not even the fullest description of the offense, were it even in the terms of a legal definition, would be sufficient without keeping close to the expressions of the statute." *Ibid.* And *Hawkins* lays down the same rule. Hawk., b. 2, c. 25, s. 110. We do not understand this language to mean that every word used in the statute, in describing the offense, must be copied into the indictment; but that those technical words which, in themselves, express the offense, or the intent of the offender, as *ravished*, *murdered*, *feloniously*, *burglariously*, &c., must be adopted. The particular departure from the language of the statute urged against the indictment is the omission of the word *unlawfully*. Hawk., b. 2, c. 25, s. 96, says that when *unlawfully* is used in a statute in describing the offense, the indictment must use it, or some other tantamount. *Feloniously* is substituted for it in this indictment, and is not only tantamount to it, but is a word of far more extensive and criminal meaning. The act complained of could not have been *feloniously*, and not *unlawfully*, done. This Court has heretofore decided that omitting the word *unlawfully* did not vitiate an indictment for murder, though the statute, on which the indictment was founded, used it in describing the crime. It was held that the common law definition was sufficient. *Jerry v. The State*, 1

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Blackf., 395. That decision is fully sustained by the case of *United States v. Bachelder*, 2 Gall., 15, and by *The People v. Enoch*, 13 Wend., 159. This last case was an indictment for murder, founded on a statute. The indictment was drawn according to the common law form, and omitted the words, 'when perpetrated from a premeditated design to effect the death of the person killed,' which, in the statute, are descriptive of the offense. The Court sustained the indictment. We are aware that one or two *English* cases can be found which militate against the authorities referred to. But we adhere to the former decision of this Court. We think the first count of the indictment good, and that the Circuit Court committed no error in overruling the motion in arrest of judgment.

Before considering the motion for a new trial, we wish to advert to a decision made by a very eminent judge, whose opinions we regard, in the general, as safe guides for [*196] other *Courts, but with whose conclusion on the subject of the right of Courts to grant new trials, in cases of convictions of capital crimes, we can not agree. We allude to the case of *The United States v. Gibert et al.*, 2 Sumn., 19. The principle there attempted to be established is, that the clause of the Constitution of the *United States* which protects an accused person from being twice put in jeopardy of life or limb for the same offense, is a prohibition against granting him a new trial, after a conviction of a capital crime on a valid indictment, and by a regular jury. And the judge assumes that the maxim of the common law, from which the constitutional provision is borrowed, is also a similar prohibition, and furnishes the ground on which the *English* Courts have, of late years, refused new trials in capital cases. Directly opposed to this decision is the later case of *The United States v. Keen*, before referred to; and with that we concur. Among various decisions reviewed and disapproved of by the distinguished judge alluded to, is that of *Jerry v. The State*, *supra*. Had the Court which decided that case adopted the same train of reasoning which convinced the learned judge, they must have come to the conclusion that the Courts of this State can not grant

new trials even on convictions for misdemeanors. For if it be true that the protecting clause in the Constitution of the *United States*, and the original maxim of the common law, amount to positive prohibitions against releasing a person convicted of felony by a new trial, the corresponding clause in our constitution, which embraces all offenses, would be a similar prohibition in all criminal cases whatever. And thus our citizens would be deprived of a privilege which all concede the common law allows; and deprived, too, by a provision designed, as we believe, for their protection.

The Supreme Judicial Court of *Massachusetts*, in the case of *Commonwealth v. Green*, 17 Mass. R., 515, used the following language: "It appears by the *English* text books, and by several decisions cited in support of the position, that in cases of felony a new trial is not usually allowed by the Courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here." In commenting on this passage, the judge says: "Now, with the greatest deference for [*197] that *learned judge (Ch. J. *Parker*, who delivered the opinion of the Court,) I can not admit that this language truly represents the state of the *English* common law doctrine on this subject. On the contrary, as I understand that doctrine, it is no matter of *practice* at all (usual or unusual) in respect to which the *English* Courts are at liberty to exercise any discretion, but it is a matter of power which a fundamental maxim of the common law prohibits the Courts from exercising."

We may be wrong, but we had thought that the whole doctrine of granting new trials in all cases, civil and criminal, had its origin merely in the *practice* of the Courts, as a substitute for the inadequate remedy afforded by the old writ of attain, which lay at the suit of the King, and not at the instance of the party aggrieved. 3 Blacks. Comm., 404; 4 Id., 361. And there is reason to believe that, formerly, the *English* Courts were in the *practice* of granting new trials in felonies as well as misdemeanors. In the case of *Rex v. Read*, 1 Lev., 9, the

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majority of the Court of King's Bench held this language: "New trials may be in criminal cases at the prayer of the defendant, where he is convicted, but not at the suit of the King where he is acquitted, no more in criminal cases than in capital." And in the case of *Rex v. Fenwicke and Holt*, Ib., *Kelynge*, J., said: "No case could be shown of a new trial in a criminal case more than in a capital." In the same case, the Court, speaking of granting new trials, declared that "the course of the Court was the law of the Court." These cases, it is true, were not in felonies, but they show the opinion of the judges of the day, that new trials were sometimes granted in capital cases, and that the granting of them were matters of practice. Nor were the new trials here spoken of on account of a mistrial, but where the verdict was against evidence. *Viner*, in his Abr., title Trial, q, g, says: "A new trial will not be granted where the defendant is acquitted in criminal and capital cases, but otherwise where he is convicted." *Blackstone* writes thus: "In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench, for in such case, as hath been said, it can not be set right by attaint." 4 Comm., 361.

[*198] Both *Viner* and *Blackstone* *cite *Rex v. Read*; and if that case does not furnish the "instance" of a new trial actually granted in a capital case, it sanctions the doctrine laid down by those authors. We are aware that at length, in 1781, the Court of King's Bench decided that new trials could not be granted in capital cases. 13 East, 416, note b. But that the decision turned upon the maxim, that a man should not be put twice in jeopardy of life or limb for the same offense, we are nowhere informed but in the case of *U. S. v. Gibert et al.* And we can not but think such a principle of decision would have been a perversion of the maxim.

The motion for a new trial in the cause before us was founded, as we have before stated, on an alleged error in the Circuit Court in refusing to suffer a question to be put, having for its object to impeach a witness for the State, by showing

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that she had made a statement inconsistent with her testimony; and also on the alleged ground that the evidence did not justify the verdict.

As to the first of these objections, it is sufficient to remark that the record does not show that the witness proposed to be impeached, made any statement in her testimony which could have been contradicted, either by a negative or affirmative answer to the question refused by the Court; nor does it appear that the witness to be impeached was interrogated in regard to the subject to which the question referred. It was right therefore to exclude the question.

In regard to the insufficiency of the evidence to justify the verdict, we can only say that had we been in the place of the jury, we might, perhaps, have come to a conclusion different from theirs. But, one witness swore positively to the perpetration by the defendant of the crime charged upon him. The jury were, by a well settled rule of law, the exclusive judges of her credibility. If they believed her, they but acquitted their consciences in finding the defendant guilty. And after their verdict has undergone the revision and received the sanction of the Circuit Court on a motion for a new trial, we do not feel at liberty to disturb it on a question of the credibility of testimony.

Per Curiam.—The judgment is affirmed with costs.

B. M. Thomas and *O. H. Smith*, for the plaintiff.

A. A. Hammond and *S. Major*, for the State.

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*ELLIOTT v. DOUGHTY.

REPLEVIN BAIL.—To support a *scire facias* against bail for the stay of execution on a judgment of a justice of the peace, it must appear by the return of a *feri facias* against the principal, that sufficient goods and chattles could not be found to satisfy the execution.

SAME.—It is not a sufficient objection for the bail in such case, that the judgment and execution against the principals were in their partnership name.

RETURN OF EXECUTION.—To a *venditioni exponas*, the constable returned

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"\$17.60 made by sale, and no more property on which to levy." Held, that the latter part of the return, viz., "and no more property on which to levy," was a nullity.^(a)

ERROR to the *Fountain Circuit Court*.

SULLIVAN, J. — *Scire facias* by *Doughty* against *Elliott* as the replevin bail of *Henderson* and *Baxly* commenced before a justice of the peace. Pleas: 1, *Nul tiel record*; 2, No execution; 3, No return of *nulla bona*. The Circuit Court gave judgment for the plaintiff.

The facts, as they appear from the *scire facias* and the proof, are, that a judgment was obtained by *Doughty* against *David S. Henderson* and *Lemuel Baxly*, by the name and description of *Henderson* and *Baxly*, before *W. V. Pollock*, a justice of the peace, which was duly replevied by *Elliott* as bail for the defendants; that at the expiration of the time for which the judgment was replevied, a *fieri facias* was issued and levied on certain goods and chattles, the property of the defendants. The property was exposed to sale but it was not sold for want of bidders, and the execution was so returned. A *venditioni exponas* was forthwith issued, to which the constable made the following return, "\$17.60 made by sale, and no more property on which to levy." Soon after the return of the *vend. exp.*, and without issuing further process, the plaintiff commenced this suit.

When bail is entered for the stay of execution on a judgment rendered by a justice of the peace, the statute requires that the first process shall be an execution against the goods and chattles of the defendant, and provides that if sufficient goods and chattles be not found to satisfy the execution, and the writ be so returned, a *scire facias* may issue against the bail. In this case there has been no such return. The return was, that property had been seized and not sold for want of bidders; but the return did not state the value of the goods, nor that the defendants had no other goods and chat-
[*200] tles on which to levy. A *venditioni exponas* issued

(a) *Doughty v. Elliott*, 8 Blackf., 405.

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commanding the constable to sell the property he had levied on, but it gave him no authority to make a further levy. He did sell, and so far he obeyed the command of the writ, but his search after other property was unauthorized, and his return that he could find none, a nullity. There has, therefore, been no such return as the statute requires to authorize this proceeding against the bail.

The plaintiff in error also objects to the judgment and execution in favour of *Doughty* against "*Henderson and Baxly*" before the justice, but according to previous decisions of this Court the objection is not maintainable. *Jones et al. v. Martin*, 5 Blackf., 351; *Downard v. Sluder*, Id., 559.

On account of the defect in the plaintiff's proof as first noticed, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiff.

G. B. Joiner, for the defendant.

NICHOLS v. SMALLEY and Another.

NEW TRIAL.—The granting of a new trial—the record showing no good cause for or against it—is not error.

PRACTICE.—A defendant can not plead in abatement on account of a variance between the declaration and the writ, without craving *oyer* of the writ and reciting it in his plea.

ERROR to the *Noble Circuit Court*.

DEWEY, J.—Debt by *Smalley and Jackson* against *Nichols*. The declaration contains two counts,—one on a sealed note, and the other for interest on moneys. Pleas, *non est factum* to the first count, under oath; *nil debet* to the second count. On the trial, the plaintiffs produced a note executed by the defendant corresponding with that described in the declaration; but in which the words "at eight *per cent.* interest from date" had been inserted apparently after the execution of the instrument.

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No other evidence was given. The jury found a verdict for the defendant. The Court, on the motion of the [*201] *plaintiffs granted a new trial; and the cause was continued. At a subsequent term, the plaintiffs filed a new declaration containing three counts. The two first counts describe the same note on which the first count of the first declaration was founded. It was a note alleged to have been executed by the defendant, and purporting to be for the payment of \$190.12, payable on or before the first day of *November*, 1840, with eight *per cent.* interest from date. The third count was on an *insimul computassent*. To the new declaration, the defendant filed a plea in abatement under oath. The plea professed to crave *oyer* of the writ, and states that *oyer* was granted; but the writ was not recited. The plea then alleged a variance between the writ and the new declaration in this, that the writ named the plaintiffs as administrators of *Enoch Smalley*, whereas they had declared in their own right. The plea was rejected on the motion of the plaintiffs. The defendant then, averring that the notes described in the first and second counts were one and the same note, alleged that after the execution of that note by the defendant it had been fraudulently altered, without the defendant's knowledge or consent, by the insertion of the words "at eight *per cent.* interest from date," whereby it became void, &c. This plea was verified by affidavit. The plaintiffs replied in denial of the plea, and concluded to the country. The defendant took issue on the replication. *Nil debet* to the third count. Verdict and judgment for the plaintiffs. Motion for a new trial overruled. All the evidence given consisted of the note, and some testimony by the plaintiffs in explanation of the alteration.

The plaintiff in error contends that the Circuit Court erred in setting aside the first verdict. We, however, can not pronounce that decision erroneous. We are not informed on what ground the new trial was granted. The record, indeed, shows no good cause for it; nor does it show there was none. If the new trial was granted because the evidence did not justify the verdict, in the opinion of the Court, that matter

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should have appeared. There might have been other and better reasons, which do not appear. We must presume the Circuit Court to have been right until the contrary is made manifest.

[*202] *Nor was there any error in rejecting the plea in abatement. To have made the *oyer* efficient, the defendant should have recited the writ. There being no such recital, the plea stands as if no *oyer* had been craved. Without the *oyer*, the plea was inadmissible. A defendant can not plead in abatement on account of a variance between the writ and declaration without showing the writ. *Hole v. Finch*, 2 Wils., 393.

We think, however, the Court erred in refusing to grant a new trial. The evidence, on the part of the plaintiffs, in explanation of the alteration of the note was extremely slight, almost none at all, and did not justify the verdict.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, R. Brackenridge, and W. H. Coombs, for the plaintiff.

L. P. Ferry and D. Wallace, for the defendants.

SCHOONOVER v. ROWE.

SLANDER—DAMAGES.—In slander, the jury can not, *in assessing the damages*, take into consideration evidence of the defendant's having spoken, since the commencement of the suit, the same words as those laid in the declaration.(a)

ERROR to the *LaGrange* Circuit Court.

SULLIVAN, J.—Slander by *Rowe* against *Schoonover*. The defendant pleaded the general issue and two special pleas. As no question arises on the special pleas, it is not necessary

(a) *Hesler v. Degant*, 3 Ind., 501; 8 Blackf., 74, 333, 495.

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to state them particularly. Verdict and judgment for the plaintiff.

On the trial, the plaintiff proved the speaking of the words as laid in the declaration; he also proved the speaking of the same words after the commencement of the suit.

The Court instructed the jury that they had a right to not only infer malice from the words spoken since the commencement of the suit, but that they had a right, and it was their duty, to take the last-mentioned words into consideration in assessing the damages, if they found the defendant guilty. To that instruction, with others which were not objectionable, the defendant excepted.

[*203] *The instruction was erroneous. Admitting that proof of words spoken since the commencement of the suit, may be received to show the malice with which the words laid in the declaration were spoken, the jury can not consider them in assessing the damages. The damages must be for the words for which the suit is brought. This point was substantially decided in the cases of *McGlemery v. Keller*, 3 Blackf., 488, and *Throgmorton v. Davis et ux.*, 4 Id., 174.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

J. B. Howe, for the defendant.

BROWNFIELD v. VAIL and Another, Administrators, and Others.

SUBJECTING INTESTATE'S LANDS TO EXECUTION.—A creditor of an intestate filed a petition in the Circuit Court, at the *September* term, 1842, to subject to execution certain lands of the deceased on a judgment against the administrators, recovered by the petitioner at the *March* term, 1842; there being no personal property to satisfy the judgment. The administrators pleaded, that, having ascertained that the personal property of the deceased was not sufficient to pay his debts, they had procured a decree of the Probate Court, at its *November* term, 1841, to sell the lands or enough of them to pay the

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debts. at a price not less than their appraised value, on certain credits; and that they had used their utmost exertions to make sale of the lands, but without effect for want of buyers. *Held*, on demurrer, that the plea was insufficient.(a)

[*204] *ERROR to the *St. Joseph* Circuit Court.

DEWEY, J.—This was a petition, filed at the *September* term of the *St. Joseph* Circuit Court, 1842, by a creditor of *P. M. McClelland*, deceased, against his heirs, administrators, and certain terre-tenants, to subject to execution certain lands of the deceased, on a judgment recovered by the petitioner against the administrators, there being no personal property wherewith to satisfy the judgment. The judgment was recovered at the *March* term, 1842, of the *St. Joseph* Circuit Court.

The administrators pleaded, that, having ascertained that the personal property of the deceased was not sufficient to pay his debts, they petitioned the Probate Court of that county for an order to sell the same lands named in the petition, for the purpose of raising assets; and that the Probate Court at its *November* term, 1841, ordered and decreed that the administrators should sell the lands or enough of them to pay the debts, at a price not less than their appraised value, on certain credits, the purchase-money to be secured in a certain manner. The administrators were to report their proceedings at the term of the Court next after they should effect a sale. The plea further alleged, that the administrators had “used their utmost exertions to make sale” of the land, but without effect “for want of buyers.” The petitioner demurred generally to the plea. The Court overruled the demurrer, and dismissed the petition. The question is as to the sufficiency of the plea.

By the statute which governed this cause, it was made the duty of the administrators, so soon as they discovered that the personal estate of the intestate was not sufficient to pay his debts, to procure an order of the Probate Court for the sale of his real estate, to raise assets to be applied by the administrators to the discharge of the debts, provided the estate was solvent.

(a) *Egbert v. The State*, 4 Ind., 399.

Brownfield v. Vail and Another, Administrators, and Others.

If it was not solvent, the money raised from the sale of both the real and personal estate should be deposited in the Probate Court to be distributed in the manner prescribed by the act. R. S., 1838, pp. 182, 183, 185, 186. The administrators were not liable to be sued until after the lapse of a year from the time of their appointment. *Id.*, 182. Nor then, with-
[*205] out alleging fraud, waste, or *negligence on the part of the administrators, provided the latter had filed their complaint to settle the estate as insolvent. *Id.*, 185. By another statute it is provided that, when the creditor of a deceased person shall obtain a judgment against the administrator or executor of the deceased, and there shall not be sufficient personal property to satisfy an execution issued thereon, the creditor may proceed, by petition in the Circuit Court, against the real property of the deceased, and subject it to execution. *Id.*, 284.

The facts of this case, as they appear from the petition and plea, are, that the administrators of a solvent estate, in *November*, 1841, procured an order of the Probate Court to sell certain lands of the deceased, for the purpose of raising assets to pay his debts, the personal estate not being sufficient to do it. The decree prohibited the sale unless the lands could be sold at their appraised value. The administrators endeavored in vain, for ten months, to execute the decree, when a creditor of the estate, having previously obtained a judgment and execution, which there was no personal property to satisfy, petitioned the Circuit Court to subject enough of the real estate to satisfy his debt to execution.

The question is, whether the unsatisfied decree of the Probate Court is a bar to the petition? We do not think it is. The petitioner shows himself to be within the provisions of the act on which his petition is founded. He is met by a decree which, for nearly a year before the filing of his petition, had remained unexecuted, and which, it is evident from its terms, may continue incapable of being executed for an indefinite period. We think the petitioner has a right, under the circumstances, to make his debt out of the land of the deceased. The demurrer to the plea should have been sustained.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. L. Osborn and J. A. Liston, for the plaintiff.

J. L. Jernegan, for the defendants.

[*206] *PAINE and Another v. THE STATE.

RECOGNIZANCE—PLEADING.—A plea to a *scire facias* on a recognizance of a former judgment in the same cause of action, must show what the defense in the first action was, and that it involved the merits of the case.

SAME.—Averments in such *scire facias*, that the recognizance was filed in the clerk's office on a certain day, and was then recorded, and that it was afterwards, on a different day, filed and recorded in open Court, are not repugnant.

SAME—VARIANCE.—The *scire facias* in such case averred that the recognizance was taken by the president judge of the third judicial circuit, at *South Hanover*, in that circuit. The recognizance, which was set out *in hæc verba* in the *scire facias*, did not show where it was taken. *Held*, that there was no variance.

PRESIDENT JUDGE.—A president judge could not, under the statute of 1838, take a recognizance out of Court, returnable to a Circuit Court out of the county in which it was taken.

ERROR to the *Switzerland* Circuit Court.

DEWEY, J.—This was a *scire facias* by the State against *Herbon* and *Paine*. The writ recites that, on the 28th day of *June*, 1839, the president judge of the third judicial circuit filed in the office of the clerk of the *Switzerland* Circuit Court a recognizance taken before him, to be recorded, and that it was then recorded by the clerk; the writ also recites that, at the *October* term, 1839, of the same Court, the judge filed the same recognizance in open Court, which was, by order of the Court, spread upon the order book. The recognizance is set out *in hæc verba*, showing that the defendants, on, &c., appeared before the president judge, and “severally acknowledged themselves to owe and be indebted to the State of *Indiana* in the sum of \$700, to be levied of their respective goods,” &c. The condition was, that *Herbon* should appear, &c., and answer a crimi-

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nal charge therein specified. The caption of the recognizance did not show the place at which it was taken; but the *scire facias* averred that it was taken at *South Hanover*, in *Jefferson* county, in the third judicial circuit, and that the president judge had full authority to take it. *Herbon* made default. *Paine* appeared and pleaded: 1, That there was no such record and recognizance as those set out in the *scire facias*; 2, That there was no such recognizance; 3, That after entering into the supposed recognizance by the defendants, and before the commencement of this suit, to wit., on, &c., "the plaintiff caused a *scire facias* to issue on the same supposed recognizance; [*207] that the defendants appeared *and defended as to said *scire facias*; and that such proceedings were thereon had, that, afterwards, to wit, on, &c., at the term, &c., it was considered by the Court that said defendants go thence, and be discharged from the said suit and *scire facias*;" all which appeared by the record, &c.

There were issues upon the two first pleas, and a demurrer to the third. The demurrer was sustained. Trial of the issues, and a joint judgment against both defendants for \$700.

It is contended that the Court erred in sustaining the demurrer. We are of a contrary opinion. The general principle is, that when a defendant relies upon a former judgment in his favour in an action for the same cause, he must show a judgment final and conclusive on the merits. *Level v. Hall*, Cro. Jac., 284; *Plummer v. Woodburne*, 4 B. & C., 625. The plea before us does not show such a judgment. The averment is, that the defendants made defense as to the first *scire facias* and were discharged from it. That might happen upon a demurrer to a defective writ, in which case the judgment would not bar a second action, the merits of the cause not being involved in the decision upon the demurrer. 1 Chitt. Plead., 227; 1 Mod., 207; Vin. Abr., Judgment, Q, 4, pl., 3; *Hitchin v. Campbell*, Blacks., R., 827. The plea should have set forth the defense made in the first action, and shown that it reached the merits of the cause.

But it is contended that the judgment should have been for

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the defendants, because it is alleged the *scire facias* is defective.

The first objection taken to the writ is, that there is a fatal repugnancy in the averment as to the time of filing and recording the recognizance in the Circuit Court. We do not perceive any contradiction in this respect. It is recited in the *scire facias* that, at a certain time, the recognizance was filed in the office of the clerk and by him recorded; and that it was afterwards filed in open Court and again recorded. There is no inconsistency here; both allegations may be true.

Another objection urged is, that the *scire facias* avers the recognizance was taken at *South Hanover* in the third judicial circuit, whereas the recognizance itself, being set out *verbatim*, does not show where it was taken; and this is conceived by *the plaintiffs in error to be a fatal variance.

Had the place of taking been stated in the *scire facias* as being contained in and forming a part of the recognizance, and that part had been omitted in the copy of the recognizance recited in the writ, the objection would have been well taken. The description would have been materially different from the copy. But this is not the case. The averment of the place of taking does not purport to be descriptive of the recognizance; it is the averment of a distinct fact susceptible of proof by parol. The averment was, perhaps, unnecessary. The Court is bound to know that a president judge of a Circuit Court is authorized to take recognizances; and when we are informed that he has taken one, and caused it to be filed and recorded in the proper Court, we are not prepared to say that it is not the legal presumption, that he exercised his authority within his jurisdiction. However this may be, the objection of variance in the present instance can not be sustained.

But the *scire facias* can not be supported. It appears that the president judge took the recognizance at *South Hanover* in the county of *Jefferson*; but the recognizance was returnable to the Circuit Court of *Switzerland* county. This it was not competent for the judge to do. No judge of a Circuit Court

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could, when this recognizance was taken, take a recognizance, out of Court, returnable to a Circuit Court out of the county where it was taken. R. S., 1838, p. 162. But the law is now different. The recognizance may be returnable to the Court of another county. R. S., 1843, p. 990.

Per Curiam.—The judgment is reversed. Cause remanded &c.

S. C. Stevens and *J. G. Marshall*, for the plaintiffs.

J. Dumont, for the State.

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*VANBLARICUM v. THE STATE.

ASSESSMENT OF DAMAGES.—In estimating the amount of damages for land taken in constructing the Central Canal, the value of the land *at the time it was taken*, and how much the complainant's land adjoining that taken had, *at the same time*, been increased in value by the location of the canal, should be taken into consideration.

SAME.—And, also, in ascertaining the amount of such damages, either party may show how the canal was progressing when the land was taken, and what appropriations of money had then been made for the completion of the canal.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—A petition was filed by *Vanblaricum*, before the board of internal improvement, for damages to his land occasioned by the Central Canal. The appraisers decided against the claim, and the complainant appealed to the Circuit Court. Verdict and judgment for the State.

The Court instructed the jury, *inter alia*, as follows: In estimating the complainant's damages, the jury should take into consideration all the advantages and disadvantages resulting to him from the canal, as to all his real property in the vicinity of the canal.

This instruction ought not to have been given. In estimating the complainant's damages, the jury were to ascertain the value of his land, taken for the canal, at the time it was taken

They were also to ascertain how much the complainant's land adjoining that taken, had, at the same time, been increased in value by the location of the canal, and to render their verdict accordingly. That the statutory provision, that in the assessment of damages in such cases as the present, the benefits resulting to the complainant from the construction of the work occasioning the injury shall be taken into consideration, is constitutional, was decided in *McIntire v. The State*, 5 Blackf., 384; and that the inquiry as to the enhanced value of the complainant's land must be only of such of his land as adjoins that taken for the canal, was settled in *The State v. Digby*, Id., 543. It was decided in *Parks v. The City of Boston*, 15 Pick., 198, that the value of the land taken in such case, should be fixed at what it was worth at the time of the taking; and that doctrine is recognized in *McIntire v. The State*, *supra*.

[*210] According to these authorities, *the instruction was wrong, because it was not the enhanced value of all the complainant's land in the vicinity of the canal, but only of that adjoining the land taken, that was to be considered in estimating the damages, and because the inquiry respecting the injury and benefits of the complainant, should be confined to the time when the land was taken.

It may be proper to observe with a view to a future trial of the cause, and as the subject is presented by one of the bills of exception, that either party may show how the canal was progressing at the time the complainant's land was taken, and what appropriations of money had then been made for the completion of the canal. Such inquiries may assist the jury in ascertaining the value of the land when it was taken, and the effect of the canal, at that time, in increasing the value of the adjoining land of the complainant.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

H. Brown, for the plaintiff.

A. A. Hammond, for the State.

Givan v. Doe, on the Demise of Tout.

GIVAN v. DOE, on the Demise of TOUT.

MORTGAGE—CONVEYANCE BY MORTGAGEE.—A mortgagee in fee of real estate has the legal title to the estate, and the same right to transfer it by deed that he has to convey by deed the legal title of any other real estate. Indeed, as the statute is understood to require conveyances of land to be by deed, the legal title of such mortgagee can be conveyed by him to a purchaser in no other way than by deed.

SAME—EJECTMENT.—Ejectment by the lessee of *B. T.*, a mortgagee in fee, against the mortgagor. The defendant, to prove the title out of the lessor, introduced the following deed: "Know all men by these presents that I, *B. T.*, of, &c., for and in consideration of the sum of \$1,200 to me secured, have granted, bargained, sold, assigned, and transferred, and do, by these presents, grant, bargain, sell, assign, and transfer, to *J. G.* and *S. M.*, all my right, claim, and interest, in and to a certain mortgage and the premises therein described, made and executed to me by *J. L. G.*, on, &c., to secure to me the payment of \$1,400 with interest, &c. And I hereby authorize and empower the said *J. G.* and *S. M.* to prosecute in my name all suits now commenced by me, or to begin and prosecute to final judgment any and all suits in my name which they may deem necessary, in and about the collection of the \$1,400 and the interest thereon accrued, or which may hereafter accrue (they being responsible for all costs, expenses, &c.)

[*211] and they, said *J. G.* and *S. M.*, are hereby fully authorized and empowered to order, direct, and control, the said mortgage and the collection of the money thereby secured, (in my name and for their use and benefit,) to all intents and purposes, as fully and amply as I might and could do myself, and to receive and receipt for the same, hereby ratifying and confirming whatsoever the said *J. G.* and *S. M.* shall and may lawfully do in the premises. Witness my hand and seal this first of *March*, 1841. *B. T.* (SEAL.)" It appeared that when this deed was executed, notes were given for the purchase-money, and that the mortgage referred to in said deed was the same with the mortgage relied on by the plaintiff. *Held*, that this instrument was a deed of bargain and sale of the mortgaged premises which passed the use to the bargainees, and that the statute of uses transferred to them the possession. *Held*, also, that said deed authorized the bargainees to collect the mortgage debt for their own use in the name of the bargainor.

ENROLLMENT OF DEEDS.—The *English* statute requiring deeds of bargain and sale to be enrolled, is not in force in this State.

WANT OF ACKNOWLEDGEMENT TO DEED.—Such deeds, under our statute, are valid between the parties without being acknowledged or recorded.

PAYMENT OF MORTGAGE.—A separation of the legal title to mortgaged premises from the claim at law to the mortgage debt frequently occurs; but if at

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any time before foreclosure the mortgagor or his assignee pay the debt, he is entitled to the legal estate.(a)

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—This was an action of ejectment, commenced against *James L. Givan* in August, 1841, for certain real estate in *Hendricks* county. Plea, not guilty. Verdict and judgment for the plaintiff.

The lessor's title, on which the plaintiff relied, was a mortgage in fee on the premises, executed to the lessor by the defendant on the 30th of *December*, 1837, to secure a debt of \$1,400, for which the defendant had executed his note to the lessor, payable five years after the date of the mortgage, with interest at the rate of eight *per cent. per annum* from the date.

To defeat the suit, by showing the title out of the lessor, the defendant relied on the following deed: "Know all men by these presents that I, *Basil Tout*, of the county of *Hendricks*, and State of *Indiana*, for and in consideration of the sum of \$1,200 to me secured, have granted, bargained, sold, assigned, and transferred, and do, by these presents, grant, bargain, sell, assign, and transfer, to *James M. Gregg* and *Samuel Melogue* all my right, claim, and interest, in and to a certain mortgage and the premises therein described, made and executed to me by *James L. Givan* on the 30th day of *December*, 1837, [*212] to secure to me the payment of *\$1,400 with interest at the rate of eight *per cent.*, due in five years from date. And I hereby authorize and empower the said *Gregg* and *Melogue* to prosecute in my name all suits now commenced by me, or to begin and prosecute to final judgment any and all suits in my name which they may deem necessary, in and about the collection of the \$1,400 and the interest thereon accrued, or which may hereafter accrue, (they being responsible for all costs, expenses, &c.;) and they, said *Gregg* and *Melogue*, are hereby fully authorized and empowered to order, direct, and control, the said mortgage and the collection of the money thereby secured, (in my name and for their use and ben-

(a) See *Johnson v. Cornell*, 29 Ind., 59.

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efit,) to all intent and purposes, as fully and amply as I might and could do myself, and to receive and receipt for the same, hereby ratifying and confirming whatsoever the said *Gregg* and *Melogue* shall and may lawfully do in the premises. Witness my hand and seal this first of *March*, 1841. *Basil Tout*, (SEAL.)” The defendant proved that the deed last named was delivered to the grantees on the day of its date; that, at the same time, notes were given for the purchase-money; and that the mortgage referred to in said deed was the same with the mortgage relied on by the plaintiff. The Court refused to instruct the jury that the deed executed by *Tout* to *Gregg* and *Melogue* operated as a conveyance of the estate in question; and this refusal is the only error assigned.

We think the instruction should have been given. The mortgagee had the legal title to the land, and the same right to transfer it by deed that he could have had to convey by deed any other real estate. Indeed, as the statute is understood to require conveyances of land to be by deed, the legal title of a mortgage in fee can be conveyed by him to a purchaser in no other way. R. S., 1838, p. 312. The instrument of writing under seal executed by *Tout* for a valuable consideration, must be considered as a deed of bargain and sale of the land in controversy. By that deed, the use of the premises passed to the bargainees, and the statute of uses transferred to them the possession. *Fite v. Doe, d. Bingham et al.*, 1 Blackf., 127. The circumstance that the deed does not appear to have been acknowledged and recorded, is not material. The [*213] English statute requiring bargains and sales *to be enrolled in one of the Courts of *Westminster*, &c., was never, from its local nature, in force here; and such deeds, under our statute on the subject, are valid between the parties without being acknowledged or recorded. *Doe d. Wayman v. Naylor*, 2 Blackf., 32; *Stevenson v. Cloud*, 5 Id., 92. There does not appear to be any legal assignment of the mortgage-debt; but the concluding part of the bargain and sale authorizes the bargainees to collect the debt for their own use in the name of the bargainor.

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From this view of the case, it appears that the bargainees have the legal title to the land, and an equitable claim to the debt—the legal right to the debt remaining in the mortgagee. Such separation of the legal title to the land from the claim at law to the mortgage-debt frequently occurs. It happens, for instance, where the mortgage is in fee and the mortgagee dies. In that case, the legal estate descends to the heir-at-law, or passes to the devisee, as trustee for the executor, and the right to the money goes to the executor. 3 Prest. on Abs., 288; Coote on Mort., 529. In *England*, when a bond is given for the debt, and the mortgage conveys the land to another, the debt, not being there assignable at law, remains in the mortgagee, and the legal title to the land is in the grantee. The grantee in such case usually takes a power of attorney to collect the debt in the grantor's name. Coote on Mort., 322. But if the mortgagor or his assignee pay the debt before foreclosure, he is entitled to the legal estate.

Considering, as we do, that the legal title to the premises in question is not in the mortgagee, it follows that this action of ejectment on his demise is not sustainable.

Per Curiam.—The judgment is reversed, at the costs of the lessor. Cause remanded, &c.

W. W. Wick, for the appellant.

C. C. Nave, for the appellee.

[*214] *THE STATE on the Relation of MCGILLYCUDDY v.
VANANDA and Others.

REVERSAL OF JUDGMENT—LIABILITY OF SHERIFF.—A sheriff having collected money on an execution, died without having paid over the money, and the judgment was afterwards reversed. *Held*, that a suit on the sheriff's bond, on the relation of the execution-defendant, against the sureties of the sheriff for the money so collected, would not lie.

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—Debt on a sheriff's bond against the defend-

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ants as the sureties of one *Swinney*, deceased. The gravamen of the action is substantially that *Swinney*, on, &c., being the sheriff of *Allen* county, collected from the relator, *McGillycuddy*, the sum of \$38.57, by virtue of an execution issued from the *Allen* Circuit Court in favour of one *Margaret Forsythe*; that after the money was so collected, the judgment on which the execution issued was reversed by the Supreme Court; that, previously to the reversal, *Swinney* died without having paid over the amount collected to the execution-plaintiff, or without having paid it into Court; and that the same is unlawfully withheld from the relator. General demurrer to the declaration, and judgment for the defendants.

This case does not involve the question whether the relator, on a proper case made, can not recover from the representatives of *Swinney* the money collected and not paid over by him on the judgment named in the declaration. The only question is, whether the facts show that the deceased sheriff was guilty of a violation of his official bond. We are of opinion they do not. He collected the money in the regular discharge of the duties of his office, on an execution in favour of a third person, to whom the money rightfully belonged until the reversal of the judgment. Until that event happened, the relator had no claim on *Swinney*, nor after it happened would his claim be admitted in a Court of justice without notice and demand. If the relator has a right to a restoration of the money, it is because events have transpired since the death of *Swinney* that give him the right, and not because *Swinney*, at any time while he was in office, was guilty of any dereliction of duty of which he can complain. The suit, therefore, can not be maintained, and the judgment must be affirmed.

[*215] **Per Curiam*.—The judgment is affirmed, at the costs of the relator.

D. H. Colerick, for the plaintiff.

R. Brackenridge, for the defendants.

Hedges v. Bird and Another.

HEDGES v. BIRD and Another.

TITLE BOND—POSSESSION.—If a purchaser of real estate from *A* pay the purchase-money, receive a title-bond conditioned for a conveyance at a future time, and be put into possession, and a subsequent purchaser from *A*, with notice, get possession afterwards, an assignee of the title-bond may, in equity, recover the possession from such subsequent purchaser.^(a)

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—The defendants in error filed a bill in chancery against *Hedges* to obtain the possession of a tract of land, to which they had an equitable title as the assignees of one *John D. Klinger*. The facts of the case, as they appear from the bill, answer, and depositions are substantially as follows: *James Klinger* was the owner of a certificate issued by the commissioners of the *Wabash* and *Erie* canal, for an eighty acre tract of land lying in the county of *Allen*; and *J. D. Klinger* was also the owner of a certificate granted by the same commissioners for an eighty acre tract adjoining the land owned by *James Klinger*. By the terms of the certificates, as well as according to the provisions of the act of 1830, “to provide for constructing that portion of the *Wabash* and *Erie* canal that lies within the State of *Indiana*,” the purchase-money would be payable in the year 1847, at which time the purchasers or their assignees would be entitled to patents. *James Klinger* sold to *J. D. Klinger* nine acres and sixty-four poles, parcel of the tract for which he held the commissioners’ certificate, and executed to him a title-bond, binding himself to convey the same so soon as a patent should be obtained. *J. D. Klinger* also sold to *James Klinger* a small parcel, containing one hundred and thirty-four poles, of the tract for which he held a certificate, and executed a like title-bond to him. The consideration was paid, and the parties were respectively put into possession.

James Klinger, subsequently to his contract with *J. D. Klinger*, sold and assigned *the certificate for the tract

(a) See *Miz v. Ellsworth*, 5 Ind., 517.

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of land containing the nine acres and sixty-four poles to one *John Spencer*, who sold and assigned it to *Hedges*, the plaintiff in error. *Spencer* and *Hedges* were informed of *J. D. Klinger's* equity at the time the assignments were made to them, respectively. *J. D. Klinger* also sold and assigned to *Bird* and *Dubois*, the defendants in error, the certificate for the tract of land owned by him, also the title-bond of *James Klinger* for the nine acres and sixty-four poles above mentioned; and at the time of the assignment last mentioned, they were informed of the contract with *James Klinger* for the conveyance of the one hundred and thirty-four poles above mentioned. *Hedges*, after his purchase from *Spencer*, became possessed of the nine acres and sixty-four poles previously sold to *J. D. Klinger*, and still has the possession. He is also in possession of the one hundred and thirty-four poles above mentioned. On the foregoing facts, the Circuit Court decreed that *Hedges* make and deliver to *Bird* and *Dubois* a title-bond for the conveyance of the nine acres and sixty-four poles above described, so soon as he should receive a patent for the same from the State; and that *Bird* and *Dubois* make and deliver to *Hedges* a title-bond for the conveyance of the one hundred and thirty-four poles above mentioned, so soon as they shall receive from the State a patent for the same.

We agree with the Circuit Court, that on the foregoing facts the complainants are entitled to relief; but not, we think, to the relief afforded by the decree of that Court. The decree is erroneous, because it requires the parties to enter into a new contract. All a Court of chancery can do in the premises is to protect the rights of the parties under the contract of their assignors, of which they had notice, and which is the foundation of the proceedings in this case.

J. D. Klinger, by his contract with *James Klinger* for the tract of land mentioned in the complainants' bill, was entitled to the possession, and possession was accordingly delivered to him. His assignees have been, without their consent or the consent of their assignor, so far as appears to us, deprived of the possession by *Hedges*. If they be not restored to the posses-

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sion, they will be deprived of their best security against a fraudulent sale of the land.

[*217] *The possession of the tract of land containing the one hundred and thirty-four poles, sold by *J. D. Klinger* to *James Klinger*, rightfully belongs to *Hedges*, and he should be secured in the possession of it.

Under the prayer for general relief, this Court may make such decree in the premises as the equity of the case requires.

Per Curiam.—The decree is reversed, and it is decreed that the defendant deliver to the complainants, on demand, possession of the nine acres and sixty-four poles of land described in the bill.

H. Cooper, for the plaintiff.

T. Johnson, for the defendants.

ELLISON and Another v. JOHNSON, for the Use of HOBBS.

WITNESS.—A person for whose use a suit is brought being liable, by statute, for costs if the suit fail, is not a competent witness for the plaintiff.

SAME.—Nor can he be rendered competent in such case by his release of his interest in the cause of action to the plaintiff.

ERROR to the *LaGrange* Circuit Court.

SULLIVAN, J.—Debt on a promissory note by *Johnson*, for the use of *J. T. Hobbs*, against the plaintiffs in error. The suit was commenced before a justice of the peace. The cause was tried upon the general issue, and a special plea, the character of which is not disclosed by the record. The Circuit Court gave judgment for the plaintiff.

On the trial, the plaintiff offered as a witness *J. T. Hobbs*, the person for whose use the suit was brought, to prove that certain payments that had been sworn to by a former witness had not been made. The defendants objected. *Hobbs* stated on his *voire dire* that he had no interest in the suit, and that it was prosecuted for the benefit of one *Chapman*. He also wrote and tendered to *Johnson* a release of all claim to the note on

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which the suit was founded, and to the proceeds thereof. The defendants still objected to the competency of *Hobbs* as a witness, but the Court overruled the objection and he was sworn accordingly.

[*218] *The Court erred in admitting *Hobbs* as a witness.

By the express terms of the statute, he was liable to a judgment for costs if the plaintiff failed in the suit. R. S., 1838, p. 458, sect. 6. The release tendered by the witness to *Johnson* could not remove that liability.

Per Curiam.—The judgment is reversed at the costs of *Hobbs*. Cause remanded, &c.

H. Cooper, for the plaintiffs.

J. B. Howe, for the defendant.

GOBLE v. GALE and Another.

DORMANT PARTNER.—A dormant partner need not be joined in a bill in equity to enforce a contract against a person who dealt only with the ostensible partner.

MECHANICS' LIEN, WHAT NOT WAIVER OF.—A mechanic's lien for work done is not waived by taking his employer's note for the money due for the work, and giving a receipt in full for such money, the note not being paid.

SAME—FILING.—Where a mechanic gives credit for work done, notice of his intention to hold a lien may be filed in the recorder's office within sixty days from the time the credit expired.(a)

ERROR to the *Jefferson* Circuit Court.

DEWEY, J.—This was a bill in equity to enforce a mechanic's lien against certain real property. It appears by the pleadings, exhibits, and depositions, that the complainant, *Goble*, contracted with *Gale*, one of the defendants, to build for him a dwelling-house on certain premises. The work was completed on the 24th of *June*, 1841; and *Gale* then executed to *Goble* several promissory notes for the money due on the building contract, and *Goble* gave *Gale* a receipt in full for it.

(a) See *Waldo v. Wallers*, 17 Ind., 534.

One of the notes, and the only one unpaid when the bill was filed for \$97.50, payable nine months after date. On the day of the maturity of this note, that is, on the 24th of *February*, 1842, *Goble* filed in the office of the recorder of deeds, notice of his intention to hold a lien on the dwelling-house erected by him, and on the ground on which it stood. On the 7th of *September*, 1841, *Gale*, being indebted to *Twining*, the other defendant, in the sum of \$1,700, mortgaged the premises to him to secure that sum, *Twining* having no knowledge [*219] of the lien claimed by *Goble*. The *mortgage was filed for record *February* 2d, 1842. *Goble*, at the time of making the contract to build the house, and at the time of filing the bill, had a dormant partner, one *Dutton*; but the contract was made by *Goble* in his own name exclusively, and *Gale* knew nothing of the partnership. The bill was filed in *May*, 1842. The Circuit Court, on the final hearing of the cause, dismissed the bill for want of equity, and decreed costs against the complainant.

The statute on which the bill is founded gives mechanics a lien on buildings constructed or repaired by them; requires any one wishing to avail himself of its provisions, "to file in the office of the recorder of the proper county, within sixty days after the debt becomes due, notice of his intention to hold a lien on the property for the amount claimed to be due," &c.; and provides that the bill to enforce the lien shall be filed within one year from the time of completing the work. R. S., 1838, pp. 412, 413.

It is contended that the bill can not be sustained for the want of proper parties, the omission to join *Dutton*, the dormant partner of *Goble*, as a complainant, being fatal. This objection can not be sustained. In common law suits it is settled, that a person contracting exclusively in his own name, though he have a dormant partner interested in the contract, need not join such partner in a suit on the contract. 1 Chitt. Pl., 13; Coll. on Part., 393. And we conceive the law to be the same in equity. Story's Eq. Pl., 157, note. *Hawley v. Cramer*, 4 Cowen, 717.

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It is also contended that *Goble* waived his lien by taking *Gale's* notes, and giving him a receipt in full for the money due for building the house. We think otherwise. A vendor's lien is not extinguished by taking the purchaser's obligation for the purchase-money. 2 Sugd., pp. 57, 58; *Boon v. Murphy*, 6 Blackf., 272. Nor does the vendor's receipt for the purchase-money indorsed on the conveyance affect the lien, provided the land conveyed be not actually paid for. *Coppin v. Coppin*, 2 P. Wms., 291. The taking the notes and giving the receipt in the present case can have no greater effect. They are not, in contemplation of law, evidence that *Goble* waived his lien; and in the absence of evidence of such intention the lien holds good.

[*220] *Another objection has been urged to the sufficiency of the bill. It is alleged that *Goble* forfeited his lien by not giving timely notice, under the statute, of his intention of enforcing it. This objection is founded upon the supposition that the sixty days, within which the act requires the notice to be given in the recorder's office, must date from the time of the completion of the mechanic's work, and not from the time when the money due him shall be payable after the expiration of a credit given. This is not an open question. We decided in the case of *Robinson et al. v. Marney et al.*; 5 Blackf., 329, that, when a credit is given, the money for materials furnished is not due, in the contemplation of the statute, until the expiration of the credit; and that giving the notice within sixty days from that time is sufficient. *Goble* filed notice of his intention to rely upon his lien on the day *Gale's* note for a part of the money due on the building contract became payable, and of course prevented his lien. *Twining*, consequently, took his mortgage of the premises in question subject to *Goble's* incumbrance.

We think the Circuit Court erred in dismissing the bill. There should have been a decree in favour of the complainant.

Per Curiam.—The decree is reversed with costs. And this Court, finding the sum of \$111.37 to be due from *Gale* to *Goble*, for which the latter holds a lien on the premises men-

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tioned in the bill, will, unless *Gale* or *Twining* pay said sum with interest, and the costs of this suit in the Court below and in this Court, to the clerk of this Court, on or before the first day of the next term thereof, decree that the premises be sold to satisfy said sum, interest, and costs.

J. Morrison, for the plaintiff.

S. C. Stevens, for the defendants.

[*221] THE STATE v. MONTGOMERY and Others.

RECOGNIZANCE.—A probate judge could not, in 1842, take a recognizance returnable to a Court out of his county.

ERROR to the *Montgomery* Circuit Court.

DEWEY, J.—The State sued out a *scire facias* against the defendants in error on a recognizance acknowledged by them before the probate judge of *Shelby* county, conditioned for the appearance of one of the recognizers before the Circuit Court of *Montgomery* county, to answer a certain criminal charge preferred against him. The recognizance was returned to the *Montgomery* Circuit Court, and there recorded. The defendants demurred to the *scire facias*, and the Court sustained the demurrer, and discharged the defendants.

We think the decision of the Circuit Court was right. The probate judge had no authority, when the recognizance was taken, in 1842, to take a recognizance returnable to a Court out of his county. By a statute of 1841, probate judges were authorized to issue writs of *habeas corpus*, and proceed upon them in the same manner in which the associate judges of the Circuit Courts were empowered to do. Laws of 1841, p. 129. This provision authorized the probate judges to take recognizances in certain cases. But the associate judges could take no recognizances which were not returnable to the Circuit Court in the county where they were taken. R. S., 1838, p. 162. The probate judge of *Shelby* county could not, therefore, take a

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recognizance, valid as such, which was returnable to the *Montgomery* Circuit Court. There was nothing on which to found the *scire facias* in the present instance.

When a person having committed a crime in one county has fled or removed into another county, he may be arrested in the latter and sent into the former for examination, where he may be discharged, committed, or recognized. R. S., 1838, p. 320. Or, if a person be arrested by the sheriff of any county on a *capias* issuing from any of the Circuit Courts on an indictment, he may recognize before the sheriff to appear at the Circuit Court which issued the process. R. S., 1838, p. 221. And

now any officer authorized to take recognizances may [*222] *take them returnable to any Court before which the offender is required to appear. R. S., 1843, p. 990.

Per Curiam.—The judgment is affirmed.

A. A. Hammond and S. C. Willson, for the State.

R. C. Gregory, for the defendants.

THE STATE, on the Relation of Congressional Township, &c., v. ANDERSON and Others.

RELATOR.—In a suit by the State on a school commissioner's bond, the writ must show the relator's name either on its face or by an indorsement.

CONGRESSIONAL TOWNSHIP.—There is no corporation named "Congressional township numbered 11 north, of range numbered 7 west."

ERROR to the *Clay* Circuit Court.

BLACKFORD, J.—This was a suit on a bond given to the State, conditioned for the discharge of the duties of a school commissioner. The writ is indorsed as follows: "This action is brought for the use of congressional township numbered 11 north, of range numbered 7 west." The declaration commences in these words: "The State of *Indiana*, for the use of congressional township numbered 11 north, of range numbered 7 west, plaintiff, complains," &c. The suit was dismissed on the defendant's motion.

The State, on Relation of Anderson, Treasurer, &c., v. Leonard and Others.

The cause of dismissal was, that the proper name of the relator was not indorsed on the writ. No doubt, the writ in these cases must show the name of the relator either on its face or by an indorsement. The indorsement here, on which alone the plaintiff relied to prove that the writ showed the name of the relator, is not sufficient. There is no corporation named "Congressional township numbered 11 north, of range numbered 7 west." The corporate name of the township is "The inhabitants of congressional township No. 11 north, in the county of, &c. R. S., 1838, p. 509; Stat., 1841, p. 64.

The declaration is also substantially defective, as [*223] the same *mistake occurs there that appears in the indorsement on the writ.

The suit was correctly dismissed.

Per Curiam.—The judgment is affirmed.

J. M. Hanna, for the plaintiff.

J. Cowgill, for the defendants.

THE STATE, on the Relation of ANDERSON, Treasurer, &c., v. LEONARD and Others.

COLLECTOR'S BOND—PLEADING.—If in a suit by the State on a collector's bond, the relator's name be inserted in the body of the writ, an indorsement of his name on the writ is unnecessary.

SAME—PRACTICE.—A motion to dismiss a suit for want of an indorsement of the relator's name on the writ, must be made on the defendant's first appearance to the suit.

EBROR to the *Clay* Circuit Court.

BLACKFORD, J.—This was an action of debt on a collector's bond, brought by the State on the relation of *Anderson*, treasurer, &c. The declaration was demurred to, and the demurrer sustained. The judgment was reversed by this Court, and the cause remanded for further proceedings. When the cause was called in the Circuit Court, after it had been remanded, the defendants moved to dismiss it for the want of an indorsement

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on the writ of the name of the relator, and the motion was sustained.

This judgment of dismissal is erroneous. The name of the relator, as shown by a bill of exceptions, was inserted in the body of the writ; and when that is the case, an indorsement of his name on the writ is unnecessary. *The State ex rel., &c., v. Anderson et al.*, decided at this term. Besides, the motion to dismiss for want of the indorsement on the writ, were it otherwise tenable, came too late. It should have been made on the first appearance of the defendants to the suit. The object of the statute, in requiring the writ to show the name of the relator, is to render him liable for costs should he fail in the suit. R. S., 1838, p. 448. In the analogous case of moving to dismiss a suit, either at law or in chancery, for want [*224] of security for costs when the plaintiff is *a non-resident, the motion must be made at the first opportunity after the non-residence is discovered, as the defendant ought not to wait until expense has been necessarily incurred. *Duncan v. Stint*, 5 Barn. & Ald., 702; *Long v. Majestre*, 1 Johns. Ch. R., 202.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiff.

A. Kinney and *S. B. Gookins*, for the defendants.

 ELLISON v. CHAPMAN.

CONTRACT.—If, by an agreement between two persons, one agrees to furnish a specified sum of money to carry on a certain business of the parties, and afterwards fails to furnish the money, he is liable to the other at law for such breach of contract.

ARBITRATION AND AWARD.—An objection to an award returned to the Circuit Court on account of its not having been returned in time, is waived if not made in that Court.

SAME.—If a suit pending in the Circuit Court be referred to arbitrators, and

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the parties agree that the award shall be made the judgment of the Court, judgment may be rendered on the award without a *scire facias*.

ERROR to the *LaGrange* Circuit Court.

BLACKFORD, J.—This was an action of covenant brought by *Chapman* against *Ellison*. The suit was founded on an agreement under seal, by which the parties agreed, *inter alia*, that the defendant should furnish \$2,000 for the purchase of public land; that the plaintiff should select the land to be purchased, &c.; that the parties should each attend to the buying and selling of the land; and that the plaintiff should have one-third of the profits of the business. There are several breaches assigned, one of which is that the defendant failed to furnish the \$2,000. By agreement of the parties, the cause was referred to arbitrators, who were to return their award to the first day of the then next term of the Court, and the award was to be made the judgment of the Court. On the second day of the term next after the order of reference, the parties appeared, an award was returned in favour of the plaintiff, and the defendant was ruled to show cause, on or before the [*225] calling of the suit, why *judgment should not be rendered on the award. At a subsequent day of the term the suit was called; and no cause being shown, judgment was rendered on the award.

The defendant contends that this is a case of partnership, and that an action at law will not lie by one partner against another; but this objection to the suit is not well founded. There are many cases where an action at law lies by one partner against another for the non-performance of a covenant contained in the articles of partnership; and this is one of those cases. *Cary* on Part., 71; *Venning v. Leckie*, 13 East, 7.

It is also objected to these proceedings that the award was not returned in time; but this objection was not made in the Circuit Court, and it is too late now to make it. *Jacobs v. Moffatt*, 3 Blackf., 395.

The last objection made is, that there should have been a *scire facias* on the award according to the statute. R. S., 1838, p. 71, sect. 7. This objection is answered by the fact that the

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order of reference shows that the parties agreed that the award should be made the judgment of the Court.

Per Curiam.—The judgment is affirmed, with two *per cent.* damages and costs.

H. Cooper, for the plaintiff.

J. B. Howe, for the defendant.

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PLEADING.—Debt lies on a recognizance taken by a justice of the peace for the appearance before him, on a subsequent day, of a person charged with an offense.

JURISDICTION—PRACTICE.—And if the penalty be beyond a justice's jurisdiction, the suit may be brought in the Circuit Court.^(a)

RECOGNIZANCE—PLEADING.—The declaration in such case need not aver that the recognizance was taken in consequence of a continuance by the justice of the examination of the person charged.^(b)

SAME.—A breach assigned in the declaration in such case that the person charged did not appear before the justice, &c., and answer, &c., and abide the judgment of the justice thereon, is sufficient on general demurrer.

ERROR to the *Harrison* Circuit Court.

BLACKFORD, J.—This was an action of debt, [*226] commenced in the Circuit Court, on a recognizance entered into before a justice of the peace, in the penalty of \$200.

The declaration is, in substance, as follows: That on, &c., at, &c., the defendant appeared before *John Dewees*, a justice of the peace, &c., and then and there acknowledged before said justice that he owed to the State of *Indiana* the sum of \$200, to be levied, &c., if default should be made in the following condition, viz., that if *Solomon Goodwin* should appear before said justice, on, &c., and then and there answer said State on a complaint for an assault and battery on *James Brown*, on the oath of *Lyman R. Burke*, and abide the judgment of said jus-

(a) See *Byers v. The State*, 20 Ind., 47.

(b) *Patterson v. The State*, 12 Ind., 86.

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tice thereon, the said recognizance should be void, &c. Averment, that said *Goodwin* did not appear before said justice, &c., and answer, &c., and abide the judgment of said justice thereon. By means whereof the recognizance became forfeited, &c. Yet, &c.

General demurrer to the declaration and judgment for the defendant.

The recognizance sued on was taken by virtue of the third section of the statute regulating the jurisdiction and duties of justices of the peace. R. S., 1838, p. 361. The provision is, that "whenever it shall become necessary to postpone or continue the examination or trial of any person charged with a crime or misdemeanor before a justice, such justice shall cause such defendant, if the offense be bailable, to enter into a recognizance for his appearance at the time and place of trial or examination, abiding the order of the justice in such case, and not departing without leave."

The defendant contends that debt will not lie on a recognizance taken under this statute, and that the only remedy on it is by *seire facias*. But we think otherwise. Upon the forfeiture of such recognizance the party becomes an absolute debtor to the State for the amount of the penalty, and we know of no reason why it may not be recovered, like any other sum certain due upon contract, by an action of debt. Such action lies on a recognizance of bail made to an individual, 2 Saund., 72, note, and the rule would seem to be the same when the recognizance is made to the State. That debt will lie on a recognizance to

the State, is decided in the cases of *The Commonwealth* [*227] v. *Green*, 12 Mass., 1, and *The People* *v. *Van Eps*, 4 Wend., 387. We are also of opinion that the suit was rightly brought in the Circuit Court, the amount of the penalty being beyond the jurisdiction of a justice of the peace.

The declaration is objected to, because there is no averment that the recognizance was taken in consequence of a continuance by the justice of the examination of a person charged with an offense. The recognizance described in the declaration is such a one as the statute authorized the justice to take under

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certain circumstances, and it must be presumed, in favour of the act of the justice, that the case was within his jurisdiction, till the contrary is shown.

The defendant objects to the assignment of the breach, but we think it is sufficient on general demurrer.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. A. Porter, for the State.

J. W. Payne, for the defendant.

 BRUMFIELD and Others v. PALMER.

EQUITY—TIME.—Courts of equity do not generally view time as being of the essence of a contract, unless it appear from the terms of the contract or the conduct of the parties, that it was the design of the parties to render it essential.

RESCISSION OF CONTRACT.—The fact that the obligee of a bond conditioned for the conveyance of real estate, retains possession of the premises, destroys his right to rescind the contract on the ground of the obligor's non-performance on his part.(a)

VENDOR'S LIEN.—The vendor's lien on real estate for unpaid purchase-money passes to his assignee of a note for the money, and may be enforced by a suit in equity by such assignee against a purchaser from the vendee with notice.(b)

SAME.—And the circumstance that the original vendor in such case had not a good title when he was to have conveyed, (the contract being unrescinded, and a good title having been obtained and tendered by him before the suit was commenced,) is not a sufficient defense.

ERROR to the *Marion* Circuit Court.

DEWEY, J.—This was a bill in equity for the specific performance of a contract for the sale of land, and to enforce a vendor's lien. The material facts of the case as they appear by the pleadings, exhibits, and depositions, are the following:

(a) *Garr v. Lockredge*, 9 Ind., 92; Id., 572.

(b) *Perry v. Roberts*, 30 Ind., 244; 11 Id., 443.

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[*228] *On the 25th day of *December*, 1838, *Brumfield* purchased of *Perry* a lot of ground in *Indianapolis* at the price of \$1,200; he paid \$400 in hand, gave his note for \$400 payable in one year, and another note for \$400 payable in two years. *Perry* executed to *Brumfield* a title-bond, conditioned for the conveyance to him of the title in two years upon the payment in full of the purchase-money, and gave him possession under the contract. The note for the first \$400 was paid by *Brumfield* to *Perry*. The other note *Perry* assigned to *Palmer* in *November*, 1839. On the 13th day of *March*, 1839, *Brumfield* sold the lot to *Smith*, and assigned to him the title-bond, *Smith* paying the full consideration at the time; but he had notice of *Perry's* lien. It was the understanding of both *Smith* and *Brumfield*, that the latter was to pay the balance of the purchase-money due to *Perry*. *Smith* took possession under *Brumfield*, and still holds it. At the expiration of two years from the date of the bond and the note for the last installment of the purchase-money, *Smith* was at the city of *Washington*, and remained there several months afterwards. In *May*, 1841, *Perry* tendered a deed for the lot to *Brumfield*, and requested him to make payment of the note; he refused to receive the deed, or pay the money. In *November* of the same year, *Palmer* caused *Perry* to tender a deed to *Smith*, and to request of him payment of the note. *Smith* declined on the ground that he had nothing to do with the payment of the money. But neither *Smith* nor *Brumfield* ever expressed a wish to rescind the contract, or placed his non-compliance with it on the ground that a deed had not been offered at the expiration of two years from the date of the bond. There was an allegation in the bill that *Brumfield* was insolvent; but that allegation was denied by the answers of *Smith* and *Brumfield*, and there was no proof on the subject. It appears by the evidence, though the fact is not noticed in the pleadings, that *Perry* purchased the lot in question of the State, and that he was entitled to a deed for it in 1835, but did not actually perfect his title until *January*, 1841. The bill was brought by *Palmer* against *Brumfield*, *Smith*, and *Perry*.

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The two former answered; the latter made default, and the bill was taken as confessed as to him. The deed which [*229] *Palmer* *caused to be tendered to *Smith* was produced in the Circuit Court, ready to be delivered upon the payment of the balance of the purchase-money.

The Circuit Court decreed, that *Brumfield* and *Smith* should pay to *Palmer* the amount due on the note, within thirty days from the date of the decreed, upon which payment the deed was to have been delivered to *Smith*. And it was further decreed, that if *Brumfield* and *Smith* failed to pay the money within the time limited, the sheriff of *Marion* county should be a commissioner to sell the lot, &c. Costs decreed against all the defendants. •

The first question presented in this cause is, whether the right of the vendor, or of his assignee of the note for a part of the purchase-money, who stands in his place, to a specific performance of the contract, has been lost by a failure to tender a deed at a proper time. The legal effect of the contract under consideration was, at law, according to the repeated decisions of this Court, that the payment of the note for \$400, the last installment of the purchase-money, and the delivery of the deed of conveyance, were to be simultaneous acts. The day for their performance was the 25th of *December*, 1840; and neither party could secure a recourse against the other for non-compliance, unless he had himself evinced a readiness to comply. As neither party took any steps on that day towards the performance of the contract, the remedy of both at law was forfeited; and either might have viewed the contract as rescinded. But the equity do not generally view time as being of the essence of a contract, unless it appear from its terms, or by the conduct of the parties, that the design of the contractors was to render it essential. 2 Story's Eq., 85; 1 Sugd. on Vend., 426. There is nothing in the nature of this contract which shows that the parties considered the particular day, on which the deed was to have been made, as material; and neither of them has treated the contract as if he so viewed it. Neither of them evinced a readiness, at the stipulated time, to perform

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on his part. On the contrary, *Smith* was absent at that time, and for several months afterwards, and did not, so far as we are informed, leave any agent to act in his stead. Besides, he retained possession of the purchased premises, and [*230] *has never offered to yield it up. Nor did he, or *Brumfield*, at the times the deeds were respectively tendered to them, place his refusal to receive the deed on the ground that it had been offered too late; nor did either of them ever intimate an intention to consider the contract as rescinded. We think it is evident, from these circumstances, that they are not now at liberty so to consider it. Indeed, the single fact that they have retained possession has destroyed their right to elect to rescind the contract, on the ground of the non-performance of the vendor, *Perry*. *More v. Smedburgh*, 8 Paige R., 600.

As the contract is not rescinded, the complainant must have a remedy to enforce the payment of the note assigned to him; and as he can not sustain a suit at law against the maker, *Brumfield*, as has been shown, his only remedy is in equity by enforcing a specific performance of the contract of sale, of which the note forms a part. His remedy, in this shape, against *Brumfield* is quite clear. And it is equally clear that *Perry*, the vendor, held an equitable lien for the unpaid portion of purchase-money on the property sold, as against *Brumfield*; and there can be no doubt that the lien of *Perry*, had he not assigned the note, would have followed the property in the hands of *Smith*, as he was a purchaser with notice. But the question still remains, did the assignment of the note by *Perry* to the complainant carry with it the vendor's lien? We think it did. This principle was settled in the case of *Lagow et al. v. Badollet et al.*, 1 Blackf., 416; and it is sustained by the decisions of the Courts of *Kentucky*. *Johnston v. Gwathmey*, 4 Litt., 317; *Edwards v. Bohannon*, 2 Dana, 98.

The fact disclosed by the evidence, that *Perry* had not completed his title at the time stipulated for the mutual performance of this contract, and his consequent inability then to convey, (had these matters been embraced by the pleadings,)

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could not have affected the right of the complainant to bring this bill. As the contract was not rescinded, it was sufficient that the vendor's title was perfected before the final hearing of the cause. *Hoggart v. Scott*, 1 Russ. & Mylne, 293.

The Circuit Court was correct in sustaining the bill. [*231] But *there are errors in the decree. There should have been no decree against *Smith* personally; and, under the circumstances of this case, there should have been no decree against the land until after an attempt to collect the money of *Brumfield* had failed. And the decree against *Smith* and *Perry* for costs was erroneous.

The Court reversed the decree, and rendered a decree, conformably to the above opinion, for the complainant.

O. H. Smith and *W. H. Brumfield*, for the plaintiffs.

C. Fletcher and *O. Butler*, for the defendant.

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VENDOR AND PURCHASER—OFFER TO CONVEY.—Declaration in debt for \$2,000 on a written obligatory by which the defendants promised, that, on a specified day, they would pay the plaintiff or order \$2,000, or to convey to him a certain tract of land. Breach, that the money had not been paid nor the land conveyed.(a)

Pleas: 1, The defendants were, when the bond became due, and still are, seised in fee of the land, and were then and still are ready to make the conveyance, but they have not been requested to make it; 2, The defendants were, when the bond became due, and still are, seised in fee of the land, and were then and still are ready to execute the deed, and now bring the same into Court; 3, The defendants have offered the plaintiff a good deed for the land; 4, The plaintiff has not prepared and tendered the defendants, or any of them, a conveyance for them to execute.

Held, that the pleas were bad.

ERROR to the *Posey* Circuit Court.

BLACKFORD, J.—This was an action of debt for \$2,000, brought by the plaintiff in error on the following obligation

(a) *Parks v. Marshall*, 10 Ind., 20.

under the hands and seals of the defendants: "On the first day of *August*, 1841, we do jointly and severally promise to pay unto *Achilles Fretageot* or to his order, the sum of \$2,000 for value received, or convey unto him, his heirs, and assigns, in fee-simple, free from all incumbrances whatever, a certain tract of land in *Posey* county, State of *Indiana*, to wit, the southwest fractional quarter section twenty-three, in township five south, range fourteen west. *New Harmony*, *February* 23d, 1838." The breach assigned in the declaration is, that the defendants have not, nor has either of them, as yet paid the money or conveyed the land.

[*232] *There are four pleas in bar. 1, The defendants were, when the bond became due, and still are, seised in fee of the land, and were then and still are ready to make the conveyance, but they have not been requested to make it; 2, The defendants were, when the bond became due, and still are, seised in fee of the land, and were then and still are ready to execute the deed, and now bring the same into Court; 3, The defendants have offered the plaintiff a good deed for the land; 4, The plaintiff has not prepared and tendered to the defendants or any of them, a conveyance for them to execute.

General demurrers to the pleas. The demurrers were overruled, and judgment rendered for the defendants.

The first and second pleas are bad. Supposing the defendants, by the contract, had the first act to do, and had the consequent choice to make the deed or pay the money on the day appointed (concerning which, however, we give no opinion), still, as there is no averment in these pleas that the money had been paid, or a conveyance of the land executed or tendered, they can not be supported. The third plea, supposing the right to elect to be as already stated, is also insufficient, because it does not show that the tender of the deed was made on the day appointed for making it, and because it does not allege that the deed was brought into Court. The fourth plea, if otherwise unobjectionable, is bad on the ground that the party bound to execute a conveyance should be at the expense of preparing it.

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The case of *Duerson et al. v. Bellows*, 1 Blackf., 217, shows that if the defendants had the right to elect whether they would, on the day appointed, pay the money or convey the land, but failed to exercise that right, they may be sued for the money.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pitcher, for the plaintiff.

E. D. Edson and *J. Lockhart*, for the defendants.

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*THE STATE v. KENNEDY.

CRIMINAL LAW.—A person indicted an assault and battery with intent to murder, may be found guilty of a simple assault and battery.(a)

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an indictment for an assault and battery with intent to murder. Plea, not guilty. Verdict as follows: “We the jury find the defendant not guilty of the felonious intent to murder, but guilty of an assault and battery as he stands charged in the indictment; and we assess his fine at \$10, and that he be imprisoned in the county jail for ten days.” The Court, on motion of the defendant, set aside that part of the verdict which finds him guilty, and gave judgment that he be discharged.

It is a general rule, that where the accusation, as in the case before us, includes an offense of inferior degree, the jury may discharge the defendant of the higher crime and convict him of the inferior one. 1 Chitt. C. L., 638. Thus, on an indictment for murder, the defendant may be found guilty of manslaughter, and on an indictment for burglary and stealing goods, or on an indictment for robbery, the prisoner may be found guilty only of the simple larceny. 1 Phill. Ev., 203.

(a) Overruled by *Gillespie v. The State*, 9 Ind., 38.

Grove v. Bradenburg.

In *England*, it is true, the defendant could not, previously to a recent statute, have been found guilty of a misdemeanor on an indictment for felony, because if he could have been thus found guilty, he would have lost several privileges which, on an indictment for the misdemeanor, the law gave him. 1 Chitt. C. L., 639; *Rex v. Westbeer*, 2 Strange, 1133. But this reason for taking such case out of the general rule to which we have referred, does not exist in this State, there being here no privilege to which the defendant is entitled when charged with a misdemeanor, which he may not claim when indicted for a felony; and *cessante ratione legis cessat ipsa lex*.

We think, therefore, that the jury had a right, on this indictment for felony, to find the defendant guilty of the inferior offense of assault and battery included in the accusation, and to acquit him of the rest. The cases of *Stewart v. [*234] The *State of Ohio*, 5 Hamm., 241, and *The State v. Steadman*, 6 Porter, 495, are in point.

Per Curiam.—The judgment setting aside part of the verdict, and discharging the defendant, is reversed with costs. Cause remanded with instructions to render judgment on the verdict.

H. O'Neal, for the State.

J. G. Marshall, for the defendant.

GROVE v. BRADENBURG.

MALICIOUS PROSECUTION.—*A* can not sustain a suit against *B* for procuring another to sue him, *A*, unless the suit against *A* was without cause.

SAME—WITNESS.—A witness is not liable to a suit for evidence given by him in a cause.

ERROR to the *Union Circuit Court*.

BLACKFORD, J.—Trespass on the case. The declaration contains two counts. The first count is to the following effect: That the defendant wickedly intending to injure the plaintiff,

&c., on, &c., falsely and maliciously informed one *Archibald Estep*, that the plaintiff had said that he, *Estep*, was a horse thief; that, by means thereof, the defendant did then and there, wickedly and maliciously, procure *Estep* to prosecute the plaintiff in slander for the supposed speaking of said words; that afterwards, when said action came on to be tried, the defendant, with the intent aforesaid, procured himself to be examined as a witness, and did then and there falsely, corruptly, and maliciously, swear on the trial that the plaintiff had spoken the said slanderous words as aforesaid; that by means of said action and perjury, *Estep* obtained a verdict and judgment against the plaintiff; and that the plaintiff had therefore to expend a large sum of money, &c. The second count is similar to the first, except that it does not charge the defendant with having been a witness in the suit by *Estep* against the plaintiff, nor state what was the result of the trial in that suit.

General demurrer to the declaration, and judgment for the defendant.

Both counts in this case charge the defendant with [*235] falsely *and maliciously procuring *Estep* to sue the plaintiff in an action of slander; and the first count also charges the defendant with perjury, in swearing as a witness on the trial of that suit that the plaintiff had spoken the slanderous words.

The law is said to be, that if one procures another to sue me *without cause*, an action lies not against him, who sued without cause; but that for this falsity in procuring my vexation an action well lies. *Perren v. Bud*, Cro. Eliz., 793; *Savil v. Roberts*, 1 Salk., 13. It must be observed that the suit for vexation, &c., can not be sustained, unless there was no cause for the action which was procured to be instituted. In the present case, the first count is bad; because it shows, by the verdict and judgment set out, that there was a good ground for *Estep's* action; and the second is bad for not alleging the failure of that action.

The charge of perjury against the defendant in giving testi-

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mony, &c., alleged in the first count, does not aid the plaintiff. See *Nelson v. Robe*, 6 Blackf., 204, and note; *Harding v. Bodman*, Hutton, 11.

Per Curiam.—The judgment is affirmed with costs.

J. B. Sleeth, for the plaintiff.

C. H. Test and *J. S. Reid*, for the defendant.

END OF MAY TERM, 1844

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1844, IN THE TWENTY-
NINTH YEAR OF THE STATE.

HOWLAND, Administrator, &c., v. RENCH and Another.

APPLICATION OF PAYMENTS.—A person who owes money on different contracts has a right to apply his payments to which of the debts he chooses; but if he fail to elect, the creditor may make the application.

SAME.—The application of payments may be proved by circumstances as well as by words.

ERROR to the Fayette Circuit Court.

SULLIVAN, J.—This was a bill in chancery, filed by *Howland*, administrator of *Catharine Rench*, against *Daniel Rench* and another, to recover the sum of \$450, which the defendant, *Daniel Rench*, had been directed by an order of the Probate Court of *Fayette* county to pay to *Catharine Rench*, for the maintenance of one *Morgan Rench*, an insane person, of whom the defendant, *Daniel*, was the guardian. *Daniel Rench*, in his answer, admits the services of *Catharine Rench*, and that she was allowed by the Probate Court the sum of \$450, as stated in the bill, but insists that he paid it to *Catharine Rench* in her

Howland, Administrator, &c., v. Rench and Another.

lifetime. It appears from the evidence that the intestate, at the time of her death, held *a promissory note [*237] on the defendant, *Daniel*, for the sum of \$1,000; that after her death, her administrator assigned it to *C. B. Clements*, by whom it was again assigned to the administrator of *Catharine Rench*; and that the administrator sued upon the note and obtained a judgment against *Daniel Rench* for the whole amount. It also appears that *Daniel Rench* had paid to *Catharine Rench*, and to others for her use and at her request, sums of money, at different times, amounting to \$450 and upwards; but that at the times of making the payments, he did not direct to which of the debts they should be applied. The question in the Circuit Court was, as it is the question here, whether the complainant had, at the time of the trial, the right to apply the payments to the judgment on the note of \$1,000, or whether they should be applied to the debt now sued for. The Circuit Court was of opinion that the payments should be applied to the last-named debt, and dismissed the bill.

When a debtor owes money on two several accounts, he may elect to which account payments made by him shall be applied. If he fail to elect, the creditor may make the application.

In this case, the debtor made no application of the payments made by him; but there are circumstances in the case which lead to the conclusion that the creditor, *C. Rench*, in her lifetime, did make the application to the debt now sued for, and that the administrator, since her death, so regarded it. No credit was indorsed by her on the note of \$1,000; and when it came into the hands of the administrator, he assigned it, without any credit indorsed, to *Clements*, who afterwards reassigned it to the administrator, who obtained a judgment at law upon it for the whole amount. The application of a payment, either by a debtor or creditor, may be proved by circumstances as well as by words. *Tayloe v. Sandiford*, 7 Wheat., 13. It seems to us that the omission by *Catharine Rench*, in her lifetime, to indorse the payments on the note, or to otherwise acknowledge them as payments on the note, and the assignment of it after-

Shimer v. Hightshue.

wards by her administrator as a valid debt of \$1,000, and subsequently taking judgment for the whole debt, are circumstances to show that the payments were not applied to [*238] that debt. The *creditor, then, having made his election, can not retrace his steps. He is bound by it, and the debt to which the payments were applied was, by that act, discharged.

Per Curiam.—The decree is affirmed, with costs.

G. Holland, for the plaintiff.

S. W. Parker and *J. S. Newman*, for the defendants.

SHIMER v. HIGHTSHUE.

APPEAL—DISCHARGE OF SURETY—If, in an appeal to the Circuit Court from a justice's judgment against two persons, the appellee, by consent of parties, take judgment against one of the appellants, without the consent of the surety in the appeal bond, the surety is discharged.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—Debt. The declaration contains two counts. The first is on a joint and several bond executed by the defendant with *L. C. Lewis* and *W. T. Lewis*. The second count is also upon a joint and several bond executed by the defendant with *L. C. Lewis*, *W. T. Lewis* and *G. W. Lewis*. The defendant craved *oyer* of the bonds declared on, and the conditions thereto, which was granted, and pleaded performance. The condition of the first-mentioned bond was that if *L. C. Lewis*, *W. T. Lewis* and *Lee Isaac* should well and truly prosecute an appeal with effect, &c., which they had taken to the Circuit Court from a judgment rendered against them by *N. Bell*, a justice, &c., in favour of *Shimer*, and should pay the condemnation money in case judgment should be rendered against them, then said bond should be void, &c. The condition of the second bond was that if *L. C. Lewis*, *W. T. Lewis* and *G. W. Lewis* should well and truly prosecute an appeal with effect, &c., (as

Shimer v. Hightshue.

in the condition of the first bond.) The plaintiff replied that the defendant had not performed, &c., because, &c., the suits mentioned in the conditions of the bonds set out in the defendant's plea were, at the *May* term, 1841, of the *Marion* Circuit Court, consolidated, and by consent of parties, but without the knowledge or consent of *Hightshue*, a judgment was taken in favour of *Shimer* against *L. C. Lewis*, *W. T. Lewis* and [*239] *G. W. Lewis*; *and that afterwards a *fi. fa.* was issued against the goods and chattels, &c., of said *Lewis* and others on said judgment, which was, in due time, returned *nulla bona*, &c. Demurrer to the replication; demurrer sustained, and judgment for the defendant.

This judgment must be reversed. We concur with the Circuit Court in the opinion that the arrangement between the plaintiff, *Shimer*, and the defendants in the appeal cases, by which a judgment was taken against the *Lewises*, and *Lee Isaac* discharged, operated as a discharge of the defendant, *Hightshue*, from the bond set out in the first count. It may be assimilated to a release of the principal debtor by the payee of a note or bond, which operates to discharge the surety from his liability. But *Isaac* had no connection with the bond named in the second count, and there was no contract between the creditor and the principal obligors that would enlarge the responsibilities of the surety on that bond. There is no reason, therefore, why *Hightshue* should claim exemption from it. We are of opinion that the replication, as to one of the debts sued for, was sufficient, and that the Court erred in sustaining the demurrer to it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c

W. W. Wick and *L. Barbour*, for the plaintiff.

W. Quarles and *J. H. Bradley*, for the defendant.

Russell v. Todd.

RUSSELL v. TODD.

VENDOR'S LIEN.—A vendor of real estate having an equitable lien on it for part of the purchase-money, is not obliged (the vendee having absconded) to proceed against the land by attachment; but he may enforce his lien in equity.

ERROR to the Cass Circuit Court.

DEWEY, J.—*Todd* filed a bill in equity against *Russell*, alleging that the complainant was seised and possessed of certain real estate, which he sold and conveyed to the defendant; that a part of the purchase-money only was paid down; that for the balance the defendant executed his note to the [*240] complainant which remained unpaid; that the *complainant had never waived his lien upon the land for that part of purchase-money still due; that the defendant left the State, leaving no other property except the land thus conveyed to him by the complainant. The prayer of the bill is, that the defendant account to the complainant for the balance of the purchase-money not paid, and interest; and that in default of paying it, the land be sold for its satisfaction; and for general relief. A demurrer to the bill for want of equity was overruled; and the defendant failing to plead or answer, after one continuance of the cause, the Court decreed according to the prayer of the bill.

It is contended by the plaintiff in error that the bill can not be sustained, because it shows upon its face that the complainant had a remedy at law by the process of foreign attachment. This objection is groundless. The complainant is not seeking, in the character of a general creditor, to collect a debt. He is seeking the enforcement of an equitable lien. Such a lien he holds, as the vendor of the land, to the amount of the purchase-money not paid. He was not bound to resort to an attachment; and had he done so, he might, in a great measure, have lost the benefit of his lien. Under an attachment, all the creditors of the defendant might have filed their demands, and

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shared, *pro rata*, with the complainant, the avails of the land. The demurrer to the bill was correctly overruled.

Per Curiam.—The decree is affirmed with costs.

W. Wright, for the plaintiff.

D. D. Pratt, for the defendant.

TATE v. WYMOND, on Appeal.

A SPECIALTY creditor made a parol agreement with his principal debtor on the day the debt became due, without the surety's consent, to give him (the principal debtor) the further time of one year for payment; and the time was given accordingly. *Held*, in an action of debt against the surety, that these facts were no defense to the suit. *Davey v. Prendergrass*, 5 B. & Ald., 187.

[*241] *In debt on a specialty, the plea of *nil debet*, though bad on general demurrer, is not a nullity; and a final judgment for the plaintiff in such suit, there being a plea of *nil debet* unanswered, is erroneous. (See 6 Ind., 128.)

VANCE v. THE INHABITANTS OF CONGRESSIONAL TOWNSHIP, &c.

MESNE PROFITS.—In trespass for mesne profits after judgment in ejectment, the defendant, to prevent a recovery of profits that accrued before service of the declaration in ejectment, may prove that he had not occupied the premises before such service.

ERROR to the *Montgomery* Circuit Court.

BLACKFORD, J.—The inhabitants of a congressional township, after a recovery in ejectment against the defendant,

Vance v. The Inhabitants of Congressional Township, &c.

brought an action of trespass against him for the mesne profits. Plea, not guilty. Verdict and judgment for the plaintiffs.

It appears by a bill of exceptions, that after the plaintiffs had introduced the record of recovery in ejectment, showing that the demise in the declaration in ejectment was laid on the first of *January*, 1841, and that after the plaintiffs had proved the rents and profits of the premises to be worth \$200 from *January*, 1841, to *March*, 1842, and before the defendant had closed his testimony to the jury, the defendant offered witnesses to prove that he was not in the actual possession of the premises up to and until the time of the acknowledgment of service of the declaration in ejectment. This evidence was objected to and rejected. This bill of exceptions shows, that the plaintiffs were endeavoring to recover the mesne profits from the date of the demise to the time when service of the declaration in ejectment was acknowledged. It was for the defendant to prevent such recovery if he could, and he had a right, for that purpose, to introduce the evidence he offered, which tended to prove that the defendant had not occupied the premises before service of the declaration in ejectment.

It is to be observed with respect to this action, that the plaintiff can only recover damages for the time the [*242] *defendant has actually occupied the premises or been in the receipt of the rents and profits; and that though, in such action, the judgment in ejectment is conclusive of the plaintiff's title from the date of the demise laid, it is no evidence of the defendant's occupation previously to the service of the declaration in ejectment. *Dodwell v. Gibbs*, 2 Carr. & Payne, 615; *Adams on Ejectment*, 390.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory, for the plaintiff.

A. Ingram and *R. Jones*, for the defendants.

Green and Others v. White.

BALL v. THE STATE.

GAMING—INDICTMENT.—An indictment against a person for suffering gaming in his grocery, should give the names of the persons who played, or state their names to be unknown.(a)

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—Indictment against a person for suffering certain unlawful games with cards for brandy, money, &c., to be played in his grocery. Plea, not guilty. Verdict and judgment for the State.

This indictment does not give the names of the persons who played, nor does it state their names to be unknown. It is for that omission bad, according to the principle on which the cases of *Butler v. The State*, 5 Blackf., 280, and *The State v. Irvin*, Id., 343, were decided.

Per Curiam.—The judgment is reversed.

J. Pettit and *S. A. Huff*, for the plaintiff.

A. A. Hammond and *S. Major*, for the State.

GREEN and Others v. WHITE.

PURCHASER PENDENTE LITE.—A purchaser of real estate, *pendente lite*, will be bound by the decree.(b)

APPEAL from the *Clark* Circuit Court.

SULLIVAN, J.—This was an original bill by *White*, in the nature of a supplemental bill, in which the complainant states *that *Green* was indebted to him in the sum of \$150, and, to secure the payment of it, mortgaged to him all his interest in two lots of ground in the town of *Jeffersonville*, known and distinguished as lots numbered 9 and 10, in square numbered 177; that *Green* having failed to pay

(a) See *Soule v. The State*, 11 Ind., 492; 29 Id., 212.

(b) *Harlock v. Branchizer*, 30 Ind., 370.

Green and Others v. White.

the said sum of \$150, the complainant filed a bill in the *Clark Circuit Court* against *Green* and *The Jeffersonville Association*, to foreclose the mortgage; and such proceedings were had thereon that afterwards, &c., a decree was entered according to the prayer of the bill; that the legal title to the lots so mortgaged was in a corporation known by the name of *The Jeffersonville Association*, but the equitable title was in *Green*; that during the pendency of the suit to foreclose, *Green* fraudulently sold and assigned all his interest in said lots to one *Adam Holt*, who had full notice of complainant's equity; and that *Holt* has obtained from *The Jeffersonville Association* the legal title to the lots by the description of lots numbered 9 and 10, in square 28, in the town of *Jeffersonville*, which the complainant alleges to be the same lots previously mortgaged to him. *Green*, *Holt*, and *The Jeffersonville Association* are made defendants to the bill, and the prayer is that the deed to *Holt* may be declared fraudulent, and that the lots be sold to pay the debt due to him from *Green*, according to the original decree. *The Jeffersonville Association* and *Holt* answered the bill, and denied in express terms notice of the mortgage by *Green* to the complainant. *Green* failed to answer, and the bill, as to him, was taken as confessed. The Court decreed for the complainant.

The plaintiffs in error contended that the decree is not sustained by the testimony in the cause. It is not necessary to advert to any part of the testimony, except that which relates to the purchase of *Green's* interest in the lots by *Holt* during the pendency of the complainant's bill to foreclosure. It appears that *Holt* purchased from *Green*, on the 17th of *September*, 1839, and obtained a deed from *The Jeffersonville Association* on the 5th of *October* following. The bill to foreclose was filed on the 30th of *August*, 1839, and subpoena served on the 2d of *September*, 1839; and at the *November* term, 1839, a decree directing the defendant to pay, &c., was entered.

The principle is now too well settled to be even [*244] doubted *that a *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree. In *Worsley v. The Earl of Scarborough*, 3 Atk.,

The State v. Moses.

392, it is said that all people are supposed to be attentive to what passes in a Court of justice, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest that this principle has been established. See, also, 2 Sugd. Vend., 281. A purchase of a right which is undergoing a judicial investigation is a fraud upon the plaintiff, and is so far considered a nullity that it can not avail against his title. *Murray et al. v. Lylburn*, 2 J. Ch. R., 441.

It is proved that the lots mortgaged by *Green* to *White* are the same that were sold by the former to *Holt*, and conveyed to *Holt* by *The Jeffersonville Association*. We are, therefore, of opinion that there is no error in the decree of the Circuit Court.

Per Curiam.—The decree is affirmed, with three *per cent.* damages and costs.

J. G. Marshall, for the appellants.

S. C. Stevens, for the appellee.

THE STATE v. MOSES.

INDICTMENT, CONCLUSION OF.—Where one statute creates an offense, and another directs the penalty, the indictment must conclude against the form of the statutes.(a)

ERROR to the *Noble* Circuit Court.

SULLIVAN, J.—This was an indictment against the defendant for that, on, &c., at, &c., being a justice of the peace, he did then and there assess a fine of one dollar against one *Reuben Varner*, for an assault and battery, &c., and which fine so assessed he, the defendant, wholly failed and neglected to report to the board of county commissioners, &c., contrary to the form of the statute, &c. The Court, on the motion of the defendant, quashed the indictment.

(a) *King v. The State*, 2 Ind., 523.

Meriam and Others v. The State, on the Relation of Mitchell.

This indictment is founded on two statutes. The 5th section of the act relating to county seminaries, R. S., 1838, p. 559, requires justices of the peace to make reports in writing to the boards doing county business in their respective [*245] *counties, at stated periods, of the names of all persons against whom they have assessed fines, together with the amount, &c. The 51st section of the act relative to crime and punishment, affixes the penalty for a violation of the duty imposed by the first-mentioned statute. The indictment is defective, because it does not conclude against the form of the *statutes*. It is settled law, that when an offense is created by one statute, and a penalty for its violation is affixed by another, an indictment for a commission of the offense prohibited, must conclude against the form of the *statutes*. 2 Hale's P. C., 173; *Dingley v. Moor*, Cro. Eliz., 750; *Broughton v. Moore*, Cro. Jac., 142. The Court, therefore, did right in quashing the indictment.

Per Curiam.—The judgment is affirmed.

W. H. Coombs, for the State.

L. P. Ferry, for the defendant.

MERIAM and Others v. THE STATE, on the Relation of MITCHELL.

PLEADING—PRACTICE.—If, on *oyer* craved of a bond of which *profert* is made in the declaration, the bond can not be produced, the declaration, by leave of the Court, should be amended by leaving out the *profert*, and inserting an excuse for not making it.

OFFICIAL BOND—PLEADING.—In a suit by the State on the relation, &c., on a sheriff's bond, an assignment of a breach, that the sheriff had officially received money belonging to the relator, which he had failed to pay to him, &c., is insufficient; the relator's right to the money should in such case be shown.

SAME—SHERIFF'S SALE.—An assignment of a breach in such suit, that the sheriff had sold land on execution to the relator and received from him the price; that the sale was afterwards set aside; and that the sheriff had refused to pay the money, on demand, to the relator, &c., is insufficient; an

Meriam and Others v. The State, on the Relation of Mitchell.

avement, that notice had been given to the sheriff that the sale had been set aside, is necessary in such case.

SAME.—It is no answer to an allegation that a sheriff's sale had been set aside, that the execution had not been set aside.

APPEAL from the *Noble* Circuit Court.

DEWEY, J.—Debt against a sheriff and his sureties on his official bond. The bond is conditioned, in the usual form, for the discharge of the duties of the sheriff, and for the payment over by him, to the proper persons, of all moneys [*246] received *by virtue of his office. The declaration makes *profert* of the obligation. The breaches assigned are: 1, That a certain sum of money, belonging to the relator, came into the hands of the sheriff by virtue of his office; and that he had failed and refused to pay the same to the relator, into the clerk's office, or to any person entitled to receive it; 2, That a *fi. fa.* was issued from the Circuit Court on a certain judgment therein rendered, by virtue of which execution the sheriff sold certain real property, belonging to the execution-defendant, to the relator, for a certain price which the relator paid to the sheriff; that after the sheriff received the money, the sale was set aside, on the motion of the execution-defendant, by the order and judgment of the proper Circuit Court; that afterwards, the money still being in the sheriff's hands, the relator demanded it of him, but he failed to pay it to the relator, into the clerk's office, or to any person entitled to receive it. The defendants craved *oyer* of the bond of which *profert* was made: whereupon, the plaintiff filed, what is called in the record, his *counter plea* to the demand of *oyer*, stating that since the filing the declaration, the bond had been destroyed by fire, and offering to produce in its stead, a copy of it appearing upon the books of the recorder of deeds. The defendants objected to the sufficiency of the *oyer*, but the objection was overruled, and the *oyer* held to be valid. The defendants then pleaded, that the execution mentioned in the declaration was not set aside, as therein stated. Issue upon this plea. The defendants also pleaded four other pleas, which were correctly overruled on general demurrer. The issue and

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assessment of damages were submitted to the Court. Finding and judgment for the plaintiff.

The first question in the cause is, was the *oyer* of the registered copy of the bond sufficient? In declaring on the bond, it was necessary for the plaintiff to make *profert* of it, or to excuse the *profert*. He did the former. If, on *oyer* being craved, it was not in his power to produce the bond, he should have obtained leave to amend his declaration, showing the cause of his inability. We know of no other course in practice of meeting an exigency of this kind. So long as the declaration contained the *profert*, *oyer* of the original, if required, [247] was indispensable. 1 Chitt. Pl., 399; **Matison* v. *Atkinson*, 3 T. R., 153, note; *Smith et al.* v. *Woodward*, 4 East, 585.

The next inquiry is whether, under the demurrer to the defective pleas, the Court should not have pronounced the declaration defective. That the first breach is clearly bad admits not of a doubt. It merely alleges that the sheriff officially received a certain sum of money belonging to the relator, and failed to pay it over. This is entirely too vague. It neither informed the defendants of the particular injury complained of, nor so stated a cause of action as to bar any other suit for the same demand. The facts showing the title of the relator to the money in the sheriff's hands should have been stated. We think the second breach is also defective. To destroy the right of the sheriff to retain the money received by him for the land sold on the execution, it should have been averred that he had notice that the sale was set aside.

It should be remarked that the plea on which issue was taken was no answer to the declaration. The allegation in the second breach is that the sheriff's *sale* was set aside. The averment of the plea is that the *execution* was not set aside. It is not necessary to decide whether, had the declaration been good, the defendants could have got rid of the finding and judgment of the Court, in consequence of their own faulty pleading.

The judgment must be reversed on other grounds.

Butler and Another v. Doe, on the Demise of Rockafellar.

Per Curiam.—The judgment is reversed at the relator's costs. Cause remanded, &c.

W. H. Coombs and *H. Cooper*, for the appellants.

J. B. Howe, for the appellee.

BUTLER and Another v. DOE on the Demise of ROCKAFELLAR.

EQUITY OF REDEMPTION.—A purchaser of an equity of redemption of real estate can not support an action of ejectment, commenced before the revised statutes of 1843, for the mortgaged premises, against a purchaser of them from the mortgagee.(a)

ERROR to the *Franklin* Circuit Court.

DEWEY, J.—This was an action of ejectment. Plea, not guilty.

Trial by the Court, and judgment for the plaintiff.

[*248] *The facts were the following: The premises in question originally belonged to *Bull*, one of the defendants, who mortgaged them to one *Berry* to secure the payment of three promissory notes. *Berry* assigned the notes to *Butler*, the other defendant, and sold and conveyed to him the mortgaged premises. Subsequently to the mortgage, *Rockafellar*, the lessor of the plaintiff, recovered a judgment in the Circuit Court against *Bull*, and issued an execution which was levied upon the mortgaged premises. The sheriff sold them to *Rockafellar*, on the execution, and executed a deed to him. There was no reservation in the mortgage of the possession to the mortgagor. At the commencement of the action, *Bull* was in possession under his landlord, *Butler*.

We think the evidence did not justify the finding of the Circuit Court for the plaintiff. To sustain the action, it was necessary that the lessor of the plaintiff should have had the legal title. But by his purchase at the sheriff's sale, he acquired only the equity of redemption, and was placed thereby in the situation of the mortgagor. The mortgagee possessed the legal

(a) *Grimes v. Doe*, 8 Blackf., 371.

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title, and might have maintained ejectment against the mortgagor. *Keech v. Hall*, 1 Dougl., 21; *Doe d. Roby v. Maisey*, 8 B. & C., 767. A mortgagee can devise or alien the legal estate, and it passes to his heir by descent. *Givan v. Doe d. Tout*, May term, 1844. *Butler* acquired the legal estate by his purchase from the mortgagee, and must be considered as standing in his place. This action, then, is governed by the same principles that would have controlled it, had it been between the original parties to the mortgage; and certainly a mortgagor can not recover in ejectment against the mortgagee in possession. But the reverse is true, as has been already stated. At least, this was the law before the late revision of the statutes. The action of ejectment by the mortgagee, his assigns or representatives, is, perhaps, now abolished. R. S., 1843, p. 459. But that revision was not in force at the commencement of this action.

Per Curiam.—The judgment is reversed at the costs of the lessor. Cause remanded, &c.

G. Holland, for the plaintiffs.

J. M. Johnston, for the defendant.

[*249] *ALDRIDGE v. DUNN and Others.

VENDOR'S LIEN.—The vendor of real estate took a promissory note for a part of the purchase-money payable some months after date, considering the buyer able to pay. When the note fell due, the payee proposed to the maker that if the latter would pay him a part of the money, he would give a credit of several months longer for the balance. The payment of part was accordingly made, the old note taken up, and a new one given for the balance payable at a future day. When the new note was given, the maker had sufficient property, besides said land, to pay the debt; and the complainant afterwards endeavoured, without effect, to collect the debt by a suit at law. *Held*, that these circumstances did not affect the vendor's equitable lien on the land sold for the unpaid purchase-money.(a)

SAME.—A purchaser of real estate for valuable consideration and without

(a) See *Bray v. Pearoll*, 12 Ind., 334.

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notice, is not bound by an equitable lien on the land for unpaid purchase-money; but the law is otherwise as to judgment-creditors.^(a)

REVIVOR.—If a defendant in chancery die before he has answered, the suit can only be revived by a bill of revivor; but if he die after answer filed, the suit may be revived by virtue of the statute, on motion of the complainant, without such bill.

APPEAL from the *Posey* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed in *July*, 1842, by the appellant, to enforce an equitable lien on real estate in *Posey* county, for unpaid purchase-money. The material facts are as follows:

In *January*, 1841, the complainant sold and conveyed to *Dunn*, one of the defendants, a certain tract of land for \$550, received at the time \$400 of the purchase-money, and took the purchaser's promissory note for the remaining \$150, payable in *July* following. Something was said at the time of the sale about the buyer's giving a mortgage, but a person present observed that the buyer was as good as any one for the balance due, and the complainant seemed to coincide in that opinion. The \$400 thus paid, were borrowed by *Dunn* of one *Rogers*, agent of *Lougee* and *Moore*, to secure which *Dunn* promised to give a mortgage on said land, but none was ever given. When said note fell due, the complainant proposed to the maker that if he would pay him \$50.00, he would give until the first of *March* following for the payment of the balance. *Dunn* accordingly paid the \$50.00, took up the old note, and gave the complainant a new one for the balance, payable the first of *March* following. The \$50.00 so paid were also bor-
 [*250] rowed of **Rogers*, agent as aforesaid. When the last note was given, the complainant asked *Rogers* if he had, or observed that he had, a mortgage on said land; *Rogers* replied that he had not, but that he had the promise of one. *Dunn*, at that time, had sufficient property, besides said land, to pay the debt; and *Rogers* then knew that the last-named note was for the balance of said purchase-money. In *October* 1841, the complainant took out a writ of *ne exeat* against *Dunn*

(a) *Pett v. Beers*, 4 Ind., 46.

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on the last-named note, in which case special bail was taken, but in *April* following, the principal being surrendered by the bail, was discharged under the act abolishing imprisonment for debt. In *November*, 1841, *Dunn* confessed, before a justice of the peace, judgments in favour of *Lougee* and *Moore* for the amount lent to him as aforesaid, and judgments also in favour of *Hinch* and *Leonard*, transcripts of which were filed in the clerk's office of the Circuit Court of said county. In *March*, 1842, the complainant sued *Dunn* on the note for \$100, obtained judgment, and took out execution thereon, which was returned *nulla bona*. There are some other matters stated in the answers, but they are not of such a character as to be evidence in the cause.

The Court decreed that the judgments of *Hinch* and *Leonard* be enjoined, and that the bill be dismissed as to the other defendants.

The complainant, in consequence of the sale, had an equitable lien for the part of the purchase-money which was not paid, the taking of the note for the amount not affecting the case; Sugd. Vend., 61; and there is not sufficient evidence to show that the lien has been abandoned. That the complainant considered the purchaser able to pay; that when the first note fell due, the time for payment of part of the amount was extended; that the purchaser then had sufficient property, besides said land, to pay the debt; and that the complainant endeavored, without effect, to collect the debt by a suit at law, can not, we think, make any difference as to the complainant's claim. Nor do the judgments confessed affect the equitable lien in question. A purchaser for valuable consideration, without notice, is not bound by such lien; but the law is otherwise as to judgment-creditors. Story's Eq., 480. We think, therefore, that the bill ought not to have been dismissed.

[*251] *There is, also, an error in the proceedings previous to the decree. The complainant, in the course of the cause, suggested the death of *Lougee*, one of the defendants, and the suit, on the complainant's motion, was revived against the heirs of the deceased. If *Lougee* had filed an answer before

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his death, the suit might, by virtue of the statute, have been revived on the complainant's motion; R. S., 1838, p. 442; but there was no such answer, and a bill of revivor was therefore necessary.

Per Curiam.—The decree dismissing the bill as to some of the defendants is reversed, and the proceedings against the heirs of *Lougee* set aside. Cause remanded, &c.

J. Pitcher, for the appellant.

G. S. Green, for the appellees.

WORTH v. BUTLER.

SLANDER.—Words charging a woman who was never married with having had a child and buried it in the garden, amount to a charge of fornication, and are therefore actionable by statute.

SAME—PRESUMPTION.—In an action of slander brought in this State for such words, it will be presumed, until the contrary be proved, that the words were spoken in this State.

SAME—PLEADING.—When the words charged are *prima facie* actionable, no averment of extrinsic facts is necessary. (a)

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of slander brought by *Fanny Butler* against *Andrew Worth*. The declaration states that the plaintiff is and always has been an unmarried woman; that she had never been suspected of being guilty of fornication; that the defendant on, &c., at said county, contriving, &c., in a certain discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, who is and always has been an unmarried woman, the false, malicious, and defamatory words following, viz.: “I (the defendant meaning) have heard that Miss *Fanny Butler* (the plaintiff meaning) has had a child, and buried it in the garden four or five [*252] years ago.” “I (the defendant meaning) have *heard that Miss *Fanny Butler* (the plaintiff meaning) has had a little one, and buried it at the back of the garden four

(a) *Robeehaugh v. Hollingsworth*, 6 Ind., 339.

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or five years ago;" (meaning and intending that the plaintiff had been delivered of a bastard child, and had been guilty of fornication.) By means whereof, &c. Plea, the general issue. There are also two spécial pleas, one of which was demurred to, but a particular notice of them is unnecessary. Verdict and judgment for the plaintiff; motion for a new trial overruled; and judgment on the verdict.

The defendant asked the Court to instruct the jury, that the plaintiff must prove that the words were spoken in this State, or of and concerning the plaintiff then resident in this State, or she can not recover. This instruction was rightly refused. The defendant's argument is, that the words, if actionable at all, are only actionable here by statute; and that, therefore, unless they were spoken in this State, or of a person resident here, they are not actionable. The answer to this is, that the words must be presumed to have been spoken in this State where the suit was brought, until the contrary be proved. The case of *Stout v. Wood*, 1 Blackf., 71, relied on by the defendant, does not apply. In that case, the words charging the plaintiff with fornication, were proved to have been spoken in the State of *Ohio*. The defendant asked another instruction to the jury which was irrelevant, and was correctly refused.

It is contended that the declaration, without averring some extrinsic facts to which the slander applied, is insufficient; but we are not of that opinion. If the words are *prima facie* actionable, no averment of extrinsic facts was necessary. We consider the words in this case to amount to a charge against the plaintiff of fornication; and if that is their meaning, they are actionable by statute. R. S., 1838, p. 452.

The verdict is objected to on the ground that the averment of the plaintiff's being unmarried was not proved. In this, however, the defendant is mistaken. The record shows the objection to be untenable.

Per Curiam.—The judgment is affirmed with 3 *per cent.* damages and costs.

H. Cooper, for the plaintiff.

W. H. Coombs and *R. Brakenridge*, for the defendant.

Godfroy and Others v. Cushman and Others.

[*253] *GODFROY and Others v. CUSHMAN and Others.

ASSIGNMENT OF LAND CERTIFICATE.—*A* purchased at the land-office a tract of land, and took a duplicate receipt for the purchase-money, and then sold and assigned the certificate of purchase to *B*, retaining the duplicate receipt. Afterwards *A*, being in possession of the land, sold the same to *C*, and gave him a bond conditioned for a conveyance at a future time. *Held*, that *A*'s retaining the duplicate receipt did not affect *B*'s priority of claim to the land.

SULLIVAN, J.—The bill in this case was originally filed in the *Allen* Circuit Court, by *James G. Godfroy*, against the present defendants, to compel the conveyance of a tract of land, the title to which, it is alleged, the defendants fraudulently obtained. In consequence of the interest of the circuit judge, the cause was certified to this Court. After bill filed, and before the defendants answered, *James G. Godfroy* died, and the suit was revived in the names of the present complainants. The bill states that on the 9th of *March*, 1833, one *Joseph McKee* purchased of the *United States*, at the land-office at *Fort Wayne*, the tract of land described in the bill, and that a duplicate receipt for the purchase-money was issued to him according to law; that *McKee* took possession of the land, and cultivated it until the spring of the year 1834, when he sold it to the said *James G. Godfroy* for the sum of \$100, and executed to him a bond for the conveyance of the title in twelve months; that *Godfroy* took possession of the land, and kept it until sometime in the year 1835; that *McKee* died in the year 1834, intestate and insolvent, without having made a deed to *Godfroy* for the land, or without having obtained a patent for the same himself. The bill further states that sometime in the year 1834, after the death of one *Benjamin Cushman*, there was found among the papers of said *Cushman* an assignment of the certificate of purchase for said land from *McKee* to said *Cushman*, dated on the 9th of *March*, 1833, acknowledged before the receiver of public moneys at the land-office at *Fort Wayne*. The bill alleges that said assignment was fraudulent and void; that it was privately

made and designedly kept secret; that the said duplicate receipt was not delivered to *Cushman*, nor was he put into possession of the land; that there was no indorsement made on [*254] said duplicate of the *purchase-money from said *Cushman*, &c. The bill further alleges that since the death of *Cushman*, and since the death of *McKee*, the heirs of *Cushman* have obtained a patent for the land, and have dispossessed the complainants. The heirs of *McKee* and the heirs of *Cushman* are made defendants to the bill.

Elizabeth McKee, an infant, answers by her guardian, and disclaims all knowledge of the matter stated in the bill, and throws herself on the protection of the Court. *Henry Cushman* and *William Cushman*, heirs of *Benjamin Cushman*, deceased, also answer, and deny that the assignment of the land certificate by *McKee* to their father was fraudulent. They say that *McKee* was indebted to their father a large sum of money, part of which was money lent to purchase the land in controversy, and that the assignment was made to secure that debt. They say that *Godfroy* had notice of the assignment to their father before he purchased from *McKee*, and that *McKee* having died without redeeming the land, they applied for and obtained a patent, &c.

The depositions prove the purchase of the land by *McKee* from the *United States*, on the 9th of *March*, 1833, and that the certificate of purchase was assigned to *Cushman*, for a valuable consideration, on the same day. They also prove that *McKee* continued in the possession of the land until the spring of 1834, when he sold to *Godfroy*, and executed the title-bond set out in the bill; and that *Godfroy* then took possession of the land, and remained in possession until the spring of 1835. They also prove that *B. Cushman* died before the sale from *McKee* to *Godfroy*. It also appears that the said duplicate receipt was seen in the possession of *Godfroy* at the time, or soon after the time, of his purchase from *McKee*, but it does not appear that he obtained it from *McKee*. There is no proof that *Godfroy* expended money in improvements on the land with the knowledge of *Cushman*, nor is there proof of secrecy

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or concealment in the transactions between *McKee* and *Cushman*, nor that *Cushman* made any false representations to *Godfroy*, or encouraged or influenced the sale of the land to him by *McKee*.

We think the complainants have not made out a case that entitles them to the relief prayed. If this were a bill [*255] to *redeem, the case might be different. The main ground on which the complainants rest their case is that *Cushman*, by permitting *McKee* to retain the duplicate receipt, enabled and encouraged him to practice a fraud on innocent persons, and that therefore, as it respects the complainants, he lost his priority; but this ground fails them both in law and in fact. In the first place, it is not proved that the duplicate was retained by *McKee*. A witness swears that about the time of the purchase of the land by *Godfroy*, he saw the duplicate in the possession of the latter; but there is no proof that he obtained it from *McKee*. We can not apply the principle on which the complainants rely, to the injury of innocent persons, on mere suspicion. But if the duplicate were left in *McKee's* possession, that fact alone would not be sufficient to charge *Cushman* with fraud. It is decided that a first mortgagee's merely allowing the mortgagor to have the title-deeds, is not sufficient to affect the former with fraud. *Jeremy on Eq.*, 193, 4, 5; *Fonb. Eq.*, 164, note n. The act must be done under circumstances, which show a concurrence and co-operation in some deceit upon a subsequent mortgagee or purchaser. *Ib.* The defendants have failed in proving notice to *Godfroy* of the assignment to *Cushman*. That defect in the proof, however, does not change the case. The complainants have wholly failed to prove those circumstances of fraud that are necessary to affect the defendants' priority of claim to the land; and the bill must, therefore, be dismissed for want of equity.

Per Curiam.—The bill is dismissed for want of equity, with costs.

H. Cooper, for the complainants.

D. H. Colerick and *W. H. Coombs*, for the defendants.

Hanna v. The Board of Commissioners, &c.

[*256] *ANDREWS and Others v. REID and Others, in Error.

WRITS of foreign attachment, issued under the statute of 1838, should be made returnable to the first day of the term next after they issue. Acc. R. S., 1843, p. 773.

HANNA v. THE BOARD OF COMMISSIONERS, &c.

APPEAL FROM COUNTY COMMISSIONERS.—An appeal lies to the Circuit Court from the order of a board of county commissioners, leasing a part of the public square in a county seat for private purposes.

SAME—PRACTICE.—When such appeal is taken in vacation, a failure to summon one of the appellees to appear at the next term of the Circuit Court, is no cause for dismissing the appeal.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—The board of commissioners of *Tippecanoe* county, at their *December* term, 1843, passed an order, by which they leased to one *Pierce* a parcel of the public square in the town of *Lafayette* for his private use, in the erection of a house there, with the power of subleasing. Within thirty days from the date of the order, *Hanna*, the plaintiff in error, filed in the office of the clerk of the board of commissioners an affidavit, setting forth that he was directly and indirectly interested in the matter of the order; that he owned improved property in *Lafayette*, lying opposite to that part of the public square included in the lease, and separated from it by a street; that the value of his property would be lessened by the erection of buildings on the leased premises; and that he was interested in the public square, as a citizen of the county, and claimed the right to object to its being put to an improper use. He, also, filed an appeal-bond conditioned according to law; and claimed an appeal from the order of the board to the Circuit

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Court. A transcript of the order, the affidavit, and the appeal-bond, were filed in the office of the clerk of the Circuit Court in due season. The commissioners appeared and moved the Court to dismiss the appeal. The motion was granted [*257] on the ground, as the record informs *us, "of defects apparent on the face" of the transcript, the affidavit, and the appeal bond.

It is not contended here that there is any defect in the form of any of the appeal papers, or that *Hanna* did not show such an interest in the subject-matter of the order as to entitle him to an appeal, provided the law allows an appeal at all in such a case. But the defendants in error vindicate the dismissal of the appeal on the ground that the order granting the lease was a mere ministerial act, from which no appeal lay; and on the ground that *Pierce* was not made a party to the appeal.

The statute which governs this case provided that "from all decisions of the several boards of county commissioners" there should be allowed an appeal by any person aggrieved. R. S., 1838, p. 156. Doubtless the boards of commissioners are directed by law to do certain things which are purely ministerial, and which are to be done without any previous conclusion of the judgment of the actors; and they may be clothed with some powers, the exercise of which is entirely discretionary. In such instances no appeal lies from their acts. But we do not conceive the order appealed from to be one of them. We are acquainted with no statute which directs or expressly authorizes the boards of commissioners to lease out or otherwise dispose of the public squares in the county seats for private uses. If they possess such a right, it must be implied from their general powers; and the order passed by the commissioners of *Tippecanoe* county, if it be not itself a "decision," implies a decision of a very important character, namely, that they possessed such a jurisdiction over the public square in *LaFayette* as authorized them to convert a part of it into private property. Whether they hold such a power, may not be entirely a question of law; it may depend somewhat upon the terms and conditions on which the public square is held by the county. But we do

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not intend now to settle anything with regard to the right of county commissioners, under their general powers, to dispose of public squares, or to question the authority of the commissioners of *Tippccanoe* county to pass the order which they did pass. Our remarks are designed only to show that

[*258] *the order amounts to a "decision" from which an appeal lay.

As to the other point, we think *Pierce* must be made a party to the appeal to the Circuit Court before that Court can try it. He was a party to the order, and had a direct interest in it. But we do not think his not being summoned at the first term of the Court after the appeal was taken, was a good cause for dismissing the appeal. When an appeal is taken in vacation (as this was) from a decision of a board of county commissioners, the appellant is bound to cause the appellee to be summoned to answer it; and if the summons be served ten days before the first day of the next succeeding term of the Circuit Court, the cause stands for trial at that term. R. S., 1838, p. 156. It is the service of the summons, and not the taking of the appeal, which makes the appellee a party to the appeal; and we think that, under the circumstances of this case, the plaintiff in error is yet entitled to summon *Pierce* into the Circuit Court.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ingram and *R. Jones*, for the plaintiff.

Z. Baird, for the defendants.

WILT, Administrator v. BIRD, Administrator.

PARTNERSHIP—EVIDENCE.—In an action at law, evidence of the state of unsettled partnership accounts between the parties is inadmissible.

SAME.—An entry made by one of the parties to a suit, in an account-book, can not be proved by parol without accounting for the absence of the book.

OFFER OF COMPROMISE—EVIDENCE.—An offer, concession or admission, made in the course of an ineffectual treaty of compromise, and constituting, in

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itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point.(a)

PRACTICE.—If the plaintiff confess the plea of *plene administravit*, a judgment in his favour should be of assets *quando acciderint*.

ERROR to the *Huntington* Circuit Court.

DEWEY, J.—Assumpsit by the administrator of *Sherdon* against the administrator of *Brady*, on promises between *their intestates, for money had and received, money paid, and for work and labour. Pleas: 1, The general issue, with an agreement of the parties to admit under it all defenses, except that of *plene administravit*; 2, *Plene administravit*. Replication to the latter plea admitting its truth, and praying judgment *quando acciderint*. Verdict for the plaintiff. Judgment against the defendant to be levied of the goods of his intestate remaining in his hands unadministered.

The plaintiff's testimony being closed, the defendant proved by one *Murray*, who had been an administrator of *Brady* before the appointment of the defendant, that soon after *Brady's* death, the witness had a conversation with *Sherdon*, who told the witness that he, *Sherdon*, had done work for *Brady*, for which the latter had paid him, on settlement, \$400, which sum he had deposited in *Brady's* hands; that the sum so deposited with *Brady*, "was all the capital which he, *Sherdon*, had to commence work with," in a partnership job subsequently undertaken by him and *Brady* on the canal near *Fort Wayne*; and that *Brady's* capital in the copartnership was \$1,900. The witness further stated, that the partnership job was partially done by the partners jointly during *Brady's* life; that after his death the whole concern was surrendered by his administrator to *Sherdon*; that the partnership stock put in by *Brady* was sold by his administrator for \$1,600 or \$1,800, and half of the avails paid to *Sherdon*; that at a time when *Sherdon* and *Brady's* administrator were attempting to settle the part-

(a) *Artes v. Kellogg*, 9 Ind., 506.

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nership accounts, *Sherdon* produced a book, in which was an entry in his handwriting, admitting that *Brady* had put into the joint stock \$1,900. All this testimony was withdrawn from the jury, on the motion of the plaintiff, and against the consent of the defendant, except that part of it which related to the origin and deposit of the \$400 with *Brady*, and to the manner in which it was afterwards disposed of. The Court instructed the jury, that if the admission of *Sherdon* made to *Murray* as *Brady's* administrator, was made during an attempt to settle the accounts between *Sherdon* and *Brady*, the object of the attempt being to avoid litigation, the admission was not legal evidence, and must be disregarded by the jury.

[*260] *That part of the testimony of *Murray* which was submitted to the jury, was, so far as the record shows, legal evidence. It tended to prove that the count for work and labour could not be supported, and also to show that the money deposited by *Sherdon* with *Brady* had been, with the consent of the former, applied as partnership stock, in which case it was not recoverable in this action. But the residue of *Murray's* testimony was correctly rejected by the Court, because some of it related to the state of the partnership business, and did not form a proper subject of investigation in a suit at law; and because another portion of it disclosed the contents of an account book, without explaining the absence of the original. Why the Court, in charging the jury as to that part of *Murray's* testimony which was retained, alluded to an attempt at a compromise by *Sherdon* and *Brady's* administrator, we are not informed. The record says nothing about such an attempt at the time *Sherdon* made the admission with regard to the money deposited with *Brady* and the manner of disposing of it. But supposing the admission to have been made under the circumstances alluded to, the charge was incorrect. An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact

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admitted to be true, but not constituting such yielded point. Peake's Ev., 19; *Turner v. Railton*, 2 Esp., 474; *Hartford Br. Co. v. Granger et al.*, 4 Conn. R., 142; *Marsh v. Gold*, 2 Pick., 285; *Gerrish v. Sweetser*, 4 Pick., 374; *Sandborn v. Neilson*, 4 N. H. Rep., 501. The charge was too broad. It excluded the admission of a fact simply because it was made during an attempt to compromise, without further regard to its nature and object.

There is also a defect in the form of the judgment. The plaintiff confessed the plea of *plene administravit*; the judgment, therefore, should have been for the amount found by the jury to be levied of the goods of the intestate, which might afterwards come to the hands of the defendant to be administered.

2 Tidd's Pr., 1017.

[*261] **Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

R. Brackenridge and *T. Johnson*, for the defendant.

DAVIS v. HEADY.

VENDOR AND PURCHASER—TENDER OF DEED.—If by a contract for the sale of real estate, the purchase-money is to be paid *before* the execution of the deed, it is no defense to a suit on a note given for the purchase-money, that the deed had not been made or tendered.(a)

SAME—WANT OF TITLE.—If to a suit on a note given in part payment for land, &c., the defendant plead that the vendor had no title, that he had not conveyed, &c., a replication that the consideration had not failed as alleged is good.

ERROR to the *Boone Circuit Court*.

BLACKFORD, J.—*Hedy* sued *Davis* in debt on a sealed note for the payment of \$200, dated the 8th of *December*, 1840, and payable the 1st of *November*, 1842. Pleas: 1, That on the 8th

(a) See *Mix v. Ellswoorth*, 5 Ind., 517.

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of *December*, 1840, the plaintiff agreed, by a title-bond, to sell to the defendant a certain tract of land; that the defendant was to pay for the same \$500—\$200 of which were to be paid on the 1st of *November*, 1842; that the plaintiff agreed by said bond that on or before the first of *November*, 1842, he would make the defendant a good title to said land if the defendant should pay said \$200; that the note sued on was given for the payment of said \$200 in consideration as aforesaid; and that the plaintiff neither did nor would, on the 1st of *November*, 1842, make or offer to make said title, though often requested. 2, That the note sued on was given in part consideration of the land mentioned in the first plea; and that the plaintiff never had any title in fee for said land. 3, That the note sued on was given in part consideration that the plaintiff would, on or before the 1st of *November*, 1842, make to the defendant a deed in fee for certain land (describing it); and that the plaintiff neither did nor could, on said day, make said deed, nor did he offer to make it.

The plaintiff craved and obtained *oyer* of the title-bond named in the first plea. The bond was conditioned [*262] to make *a good title for the land, &c., on or before the 1st of *November*, 1842, provided the last payment for the land was made *before* the deed was to be executed. The *oyer* being given, the plaintiff demurred to the first plea. Replication to the second and third pleas, that the consideration had not failed in manner and form as alleged, and demurrer to the replication. The demurrer to the first plea was sustained, and the demurrer to the replication was overruled.

The issues in fact were submitted to the Court, and judgment rendered for the plaintiff.

The only questions in this case are as to the validity of the first plea, and of the replication to the second and third pleas. The first plea is bad. It appears from the title-bond, which, by the *oyer*, is a part of that plea, that the plaintiff had expressly stipulated that the purchase-money should be paid *before* he was to execute the deed. It is no defense, therefore, to a suit for the money, that the deed had not been made or

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tendered. The replication is sustained by the case of *Thomas v. Quick*, 5 Blackf., 334.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

C. C. Nave, for the plaintiff.

W. W. Wick, for the defendant.

FERGUSON v. RHOADES.

VENDOR AND PURCHASER—PLEADING.—*Assumpsit*. The first count was as follows: That on the 28th of *December*, 1840, the defendant sold to the plaintiff a lot of ground numbered 12 in the town of *Richmond*, and, on the sale thereof, executed to the plaintiff a penal bond in the sum of \$1,000, with a condition, which, after reciting the said sale for the sum of \$500, payable as follows, \$100 in hand, a note for \$100 payable on the first of *October*, 1841, and a note for \$300 payable on the first of *October*, 1842, was for the executing, by the defendant to the plaintiff, of a good and sufficient warranty deed for the said lot on the payment of said notes; that, on the execution of said bond, the plaintiff paid the defendant the \$100 in cash, and executed the notes in the condition of the bond mentioned, and entered into possession of the lot; that, at the time of said sale, there was an unpaid mortgage on the lot previously executed by one *A*, the former owner of said lot, before the defendant had any title to it, to one *B*, for the sum of \$300, of which mortgage the plaintiff was ignorant until long after

[*263] his purchase; that afterwards, in 1842, the lot was sold under a decree on the mortgage, and the purchaser under the decree turned the plaintiff out of possession; that the defendant, therefore, **was unable** to make the plaintiff a title to the lot; and that the plaintiff, before notice of the mortgage, had made valuable improvements, &c.; yet the defendant, though often requested, had refused to pay the \$100 paid on the lot, or to pay for the improvements. *Held*, that this count was bad, it containing no promise on which the action could be supported.

SAME.—The second count was for money had and received, &c. One ground relied on to support this count was, that the defendant had no title to the lot sold to the plaintiff, as stated in the first count; and to show such want of title, the mortgage, decree, and sale under the decree, mentioned in the first count, were proved. *Held*, that the mortgagor's title not being proved, the evidence was insufficient.

SAME—PRACTICE.—In this case there were pleas to the first count, and general demurrers to the pleas. *Held*, that the first count being bad, the defendant was entitled to judgment on the demurrers.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—*Rhoades* brought an action of assumpsit against *Ferguson*. The declaration contains two counts. The first count is substantially as follows: That on the 28th of *December*, 1840, the defendant sold to the plaintiff a lot of ground, numbered twelve, in the town of *Richmond*, and, on the sale thereof, executed to the plaintiff a penal bond in the sum of \$1,000, with a condition, which, after reciting the said sale for the sum of \$500, payable as follows: \$100 in hand, a note for \$100, payable on the 1st of *October*, 1841, and a note for \$300, payable on the 1st of *October*, 1842, was for the executing, by the defendant to the plaintiff, of a good and sufficient warranty deed for the said lot, on the payment of said notes; that on the execution of said bond, the plaintiff paid the defendant the \$100 in cash, and executed the notes in the condition of the bond mentioned, and entered into possession of the lot; that, at the time of said sale, there was an unpaid mortgage on the lot previously executed by one *Miller*, the former owner of said lot, before the defendant had any title to it, to one *Derickson*, for the sum of \$300, of which mortgage the plaintiff was ignorant until long after his purchase; that afterwards, in 1842, the lot was sold under a decree on the mortgage, and the purchaser under the decree turned the plaintiff out of possession; that the defendant, therefore, is [*264] unable to make the plaintiff a title to the lot; *and that the plaintiff, while in possession of the lot, and before notice of the mortgage, made valuable improvements, &c.; yet the defendant, though often requested, has refused to pay the \$100 paid on the lot, or to pay for the improvements.

The second count is a general one for money paid, money had and received, work and labour, and goods sold and delivered.

There are five pleas. The first is non-assumpsit to both counts. The second, third, and fourth are only to the first count. The fifth, which is to the second count, is a plea of payment. There were general demurrers to the second, third, and fourth pleas. The demurrer to the third plea was overruled,

Ferguson v. Rhoades.

and the demurrers to the others were sustained. It is unnecessary to examine the pleas demurred to, as they are only pleaded to the first count, and that count can not be sustained. It is bad in substance, on the ground that it contains no promise on which the action of assumpsit can be supported. The Court, in deciding on the demurrers to the pleas, said nothing as to the first count to which they were pleaded, and thus permitted that count to stand as valid. This is an error of which the defendant may complain, whether the pleas demurred to were good or bad.

There were issues in fact on the first and fifth pleas. There was also an issue on the third plea; but that plea being only to the first count, was immaterial. The cause was submitted to the Court, and judgment rendered for the plaintiff.

The following is the evidence: 1, A title-bond executed by the defendant to the plaintiff, as described in the first count; 2, The mortgage described in that count; 3, A decree for the complainant in a suit by the mortgagee against the mortgagors, *Miller* and wife, on the mortgage, and a sale under the decree, to one *Joseph Derickson*, of the lot mortgaged; 4, Parol evidence of the sale of said lot, as shown by the title-bond.

This evidence does not authorize a judgment for the plaintiff. One ground relied on to support the action is, that the defendant had no title to the lot sold; and to show his want of title, the mortgage, decree, and sale under the decree, were proved. An obvious defect in the evidence appears [*265] *from its not showing that *Miller* and wife, the mortgagors, ever had any interest in the lot. If the mortgagors had no title to the lot, the mortgage, or proceedings in the suit on it, are no evidence in the case of the defendant's want of title; and if the mortgagors had an interest in the lot, the plaintiff should have proved it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

W. A. Bickle, for the defendant.

Bunts v. Cole and Another.

BUNTS v COLE and Another.

JUDICIAL SALE—FRAUD BY PURCHASER.—If a bidder at sheriff's sale of real estate prevent others from bidding, by representations respecting the object of his bid, and then buy the property at the sale at a price much below its value, the sale is void as against public policy, and as a fraud upon the judgment-debtor and his creditors.(a)

CHANCERY—PRACTICE.—If a defendant in chancery submit the cause on bill, answer, and depositions, the filing of a replication is waived.

ERROR to the *LaGrange* Circuit Court.

SULLIVAN, J.—The bill in this case was filed by *Bunts*, the plaintiff in error, to set aside, as fraudulent, a sale of a tract of land made by the sheriff of *LaGrange* county. The bill states that, by virtue of a judgment and execution in favour of one *McIlvaine* for the sum of about \$50, a tract of land belonging to the complainant, of the value of \$700, was sold by the sheriff of the county of *LaGrange*, and purchased by *Francis F. Jewitt*, at and for a sum barely sufficient to satisfy the judgment; that fraudulent means were resorted to by *Jewitt* to purchase the land at a price greatly below its real value; that while the sale was progressing, he represented to persons who were bidding for the land, that the complainant had deserted his wife and children, leaving them in a destitute condition, and that he, as the agent of *Allen B. Cole*, a son of the complainant's wife by a former husband, wished to purchase the land for the benefit of complainant's family; that by means of his representations, &c., persons were induced [*266] to refrain from bidding, &c. The bill *further states, *Jewitt* acted as the agent of *Cole* in making said purchase, and that the purchase-money was furnished by *Cole*. *Jewitt* and *Cole* are made defendants to the bill.

Cole, in his answer, admits the sale of the land by the sheriff, and the purchase of it by *Jewitt* as his agent. He says that a short time before the land was sold, being then a resident of *Hamilton* county, he visited his mother, the wife of the

(a) *Gilbert v. Carter*, 10 Ind., 16; 24 Id., 264.

complainant, in *LaGrange* county; that he found her residing on said land, abandoned by her husband, and supporting herself by her own labour; that he thereupon determined to purchase the land, intending it for the use of his mother and her children so long as they wished to live on it; that he employed his co-defendant, *Jewitt*, to purchase the land for him, and furnished him with \$54.50 with which to make the purchase. He admits that the sheriff conveyed the land to *Jewitt*, and that *Jewitt* has since conveyed it to him.

The answer of *Jewitt* admits the purchase of the land at the sheriff's sale by the respondent, as the agent of *Cole*, for the sum of \$54. It denies that the respondent made any false representations to prevent others from bidding for the land, but admits that he did, at and pending the sale, make it known to some persons that he was bidding for the land, not for himself, but for his co-defendant *Cole*, whose object was to purchase it as a home for his mother. The respondent admits that, while the sale was progressing, a stranger who was present offered a bid for the land, or talked about doing it, but when he was informed that respondent was acting as the agent of *Cole*, he declined bidding. He admits that he received a deed for the land from the sheriff, and says he has conveyed to *Cole*.

No replications to the answers were filed; depositions were taken; and at the final hearing on bill, answers, and depositions, the Court dismissed the bill.

Frederick Hamilton swore, that he was the sheriff of *LaGrange* county at the time the land was sold, and that the sale was conducted by himself in person; that there were several persons at the sale, but that no one bid except *Jewitt* and another man who was a stranger to the witness; that when the the stranger bid for the land, *Jewitt* took him aside, [*267] they *shortly returned, and the stranger then withdrew his bid and would not bid again; that before he was taken away by *Jewitt*, he appeared to be anxious to bid; that witness described the land to him, and told him the title was good. The witness further says, that *Jewitt* told him that

he was purchasing the land for the benefit of the wife and children of *Bunts*, on hearing which, he, the witness, did not care how cheap the land sold, and so told the stranger.

Jonathan Woodruff swears that he did not attend the sale and bid, because he was assured by *Jewitt*, that Mrs. *Bunts* would pay him a debt that her husband owed him; that he considered *Jewitt* to be responsible for the debt, and had it not been for what *Jewitt* and Mrs. *Bunts* said, and the arrangement made by them, he should have attended the sale and bid more than *Jewitt* did. He understood the object they had in view to be, that Mrs. *Bunts* might get the land as cheap as possible. He further states that neither *Jewitt* nor Mrs. *B.* paid him, but that *Bunts* himself paid the debt.

James H. Holmes testifies, that he did not attend the sale and bid for the land as he intended, because he was assured by *Jewitt*, that a debt that *Bunts* owed him should be paid; and, also, because he was told by *Jewitt* that the land was to be purchased for the use of Mrs. *Bunts* and her children.

Three witnesses swore that the land with the improvements was worth, at the time of the sale, \$500.

The testimony very clearly proves that the conduct of *Jewitt*, however humane his motives were, prevented competition at the sale. Through his representations, the property of the complainant was sold at a great sacrifice. His appeals to the sympathies of the bystanders were well calculated to prevent them from bidding for the land. This was against public policy. The law provides, in various ways, for a fair competition in sales made by its authority, and whatever prevents it is a fraud on the sale. *Jones v. Caswell*, 3 Johns. Cas., 29. It is also a fraud on the debtor and his remaining creditors, by depriving the former of the opportunity of obtaining a full equivalent for the property, which is devoted to the payment of his debts. *Ib.* If underbidders or puffers are employed at an auction to enhance the price and deceive other bidders, and they are in fact misled, the sale will be [*268] *held void as against public policy. The reason is, that a fair competition is prevented. The parties do

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not meet on equal terms. The same equitable principle must prevail, where competition is prevented by any combination or trick, on the part of the bidders, to the serious injury of the debtor. *Doolin v. Ward*, 6 Johns. R., 194; *Wilbur v. How*, 8 Johns. R., 444.

The omission to file a replication can not, under the circumstances, be assigned for error. The defendant, having consented to submit the cause on bill, answers, and depositions, must be considered as having waived it. *Demaree et al. v. Driskill*, 3 Blackf., 115.

We are of opinion, that the sale referred to in the bill was a fraud on the complainant and must be set aside. The purchase was made by *Jewitt* as the agent of *Cole*, and with his money. *Cole* is not an innocent purchaser; he is affected by the acts of his agent. He is, however, entitled to be refunded the purchase-money, which was applied to pay the complainant's debt.

The Court reversed the decree with costs, and decreed that the sheriff's sale was void, but that *Cole* should retain a lien on the land for the money paid by him, &c.

J. B. Howe, for the plaintiff.

W. H. Coombs, the defendants.

STARBUCK v. LAZENBY, in Error.

THE declaration in assumpsit contained a count on a promissory note and a general count for goods sold and delivered. Judgment by default. Held, that a writ of inquiry was necessary. *McFall et al. v. Wilson et al.*, 6 Blackf., 260. (4 Ind., 78.)

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*GRIMES v. ALSOP.

PLEADING.—A plea putting in issue matters of fact and of record should conclude to the country, and the issue should be tried by a jury.

SAME—PRACTICE.—A matter of fact, improperly alleged in pleading to be a matter of record, may be referred to a jury.

ERROR to the *Carroll* Circuit Court.

DEWEY, J.—Covenant on the warranties in a deed of bargain and sale. The declaration sets out a covenant of seisin, a covenant that the premises conveyed were free from incumbrance, and a covenant for quiet enjoyment; alleges that the defendant was not seised, that the premises were not free from incumbrance, and that the defendant had not secured the plaintiff in the quiet enjoyment of the premises; and then avers that, at the time of the execution and delivery of the deed, there was an unsatisfied judgment against the defendant, on which an execution was afterwards issued, by virtue of which the sheriff sold the premises to a third person, who evicted the plaintiff. There is no averment of *prout patet per recordum*. The defendant pleaded that there was no record of the judgment, the execution, or the sheriff's sale, as set out in the declaration; that the plaintiff had not been evicted; that the defendant was lawfully seised; that the premises were free from incumbrance; and that the defendant had defended the plaintiff in quiet possession. The plea has no clause of verification, nor does it conclude either to the Court or country. The plaintiff replied that there was a record of the judgment, the execution, and the sheriff's sale; that the plaintiff was evicted; and that the premises were not free from incumbrance; concluding with a verification by the record. There was a jury trial; verdict and judgment for the plaintiff.

It is contended that the trial should have been by the Court, and that submitting the issue to the jury was erroneous.

There was not much attention paid to accuracy of pleading in the declaration, the plea, or the replication. The declaration, however, substantially assigns a breach of the covenants

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against incumbrance, and for quiet enjoyment. In doing so, it alleges both matter of record and of fact. The [*270] *sheriff's sale, at least, is of the latter description, and could be proved only by his deed, which was not a matter of record. The plea denies, in substance, all the allegations of the declaration in assigning the breach, and, of course, puts in issue both matter of record and matter of fact. A plea of this character should conclude to the country, and be tried by a jury. 1 Chitt. Pl., 556, 558. The replication is nothing but a repetition of the declaration, except that it improperly avers that the sheriff's sale was a matter of record, and refers it to the Court for trial. But this improper averment does not affect the validity of the trial by the jury. *Brown v. Van Deuzer*, 10 Johns., 51.

Per Curium.—The judgment is affirmed with costs.

A. L. Robinson, for the plaintiff.

D. D. Pratt, for the defendant.

GOTT v. MITCHELL.

EXECUTION—JUSTIFICATION TO OFFICER.—An execution legal on its face, and showing justification in the Court that issued it, though it issued irregularly—even without a judgment—is a justification to the officer acting under it, notwithstanding he had notice of the irregularity.

ERROR to the *Montgomery Circuit Court*.

DEWEY, J.—Trespass for taking and carrying away goods. Plea, not guilty. The cause was submitted to the Court upon the following facts: One *Brooks* confessed a judgment before a justice of the peace for more than \$20.00, on a voluntary appearance, and without making oath that the debt, for which the judgment was confessed, was justly due, &c. An execution in the usual form (not showing the want of the oath) was issued upon the judgment, and placed in the hands of the defendant, a constable. He levied the writ upon the goods named in the

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declaration, they being the property of *Brooks*. Subsequently, two writs of *fi. fa.* against *Brooks* were regularly issued from the Circuit Court, and delivered to the plaintiff, a sheriff, who levied them upon the same property which had been taken by the defendant, gave him notice that the judgment on *271] which his execution *had issued was confessed without oath, and forbade him to proceed any further. The defendant, notwithstanding, re-took the property and sold it on the execution. The Circuit Court found for the defendant, and rendered judgment accordingly.

The statute prohibits justices of the peace from rendering judgment by confession, on voluntary appearance, without an oath by the party confessing that the debt is just, &c., for more than \$20.00; but it provides that, though the oath be admitted, the judgment shall be valid against the defendant and his representatives. R. S., 1838, p. 365.

It is contended that this statute rendered the confessed judgment a nullity as to all persons not a party to it; and, therefore, the constable committed a trespass in proceeding to sell the goods which he had seized, after the levy of the execution in the sheriff's hands, and after notice that the justice's judgment had been rendered without the proper oath.

The premiss may be true, but the inference is not correct. The question here is not, whether the regular execution-creditors of *Brooks* had any means of avoiding their regular judgment confessed before the justice; but the inquiry is, whether the defendant was justified in executing the writ, under which he acted. That writ was legal upon its face, and showed jurisdiction in the justice. The law is, that a writ, having these characteristics, however irregularly issued, even though there be no judgment on which to found it, is a justification to an officer acting under it. Nor did the notice, given to the defendant before he completed the execution of the writ, affect his authority. He was not bound to look beyond his process. Had he seen fit to assume the responsibility of judging for himself, whether the circumstances under which the writ issued, would have excused him for not obeying it, he might have done so:

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and perhaps the excuse would have been sufficient. But he was not bound to run the hazard. These principles are established by the cases of *Tarlton v. Fisher*, Dougl., 671, and *Whitworth v. Clifton*, 1 M. & Rob., cited in 4 Harr. Digest, 2924. The judgment of the Court is correct.

Per Curiam.—The judgment is affirmed with costs.

R. C. Gregory, for the plaintiff.

H. S. Lane and *S. C. Willson*, for the defendant.

[*272] *HOOKER and Others v. THE STATE, on the Relation of HAYNES and Another.

JUSTICE'S BOND—PLEADING.—Suit by the State, on the relation of *A*, on a justice's bond, brought for money collected by the justice on a judgment rendered by him, and alleged to have been assigned to the relator. *Held*, that a plea denying the assignment should be sworn to.

SAME.—The plea of *nil debet* to debt on bond is bad on general demurrer.

LEGAL TENDER.—A justice of the peace has no authority, without special directions from the judgment-creditor, or person entitled to the judgment, to receive any thing but gold or silver in payment of a judgment rendered by him.

ASSIGNMENT OF JUSTICE'S JUDGMENT.—The judgment of a justice of the peace may, by statute, be so assigned as to authorize the assignee to be the relator, in a suit on the justice's bond for the money collected by the justice on the judgment.

PRACTICE.—A judgment shown to be right by the evidence in the record, will not be reversed on account of any instructions given to the jury.(a)

SAME.—The issue on a plea of *nil tiel record* should be tried by the Court and not by a jury.

The Court of a justice of the peace is a Court of record.(b)

ERROR to the Warren Circuit Court.

BLACKFORD, J.—This was an action of debt against *Hooker* and others on the bond of a justice of the peace. To show a breach of the condition of the bond, the declaration alleges that one *Evans* obtained a judgment before the justice for a

(a) *Treagarden v. Hetfield*, 11 Ind., 522.

(b) *Draggou v. Graham*, 9 Ind., 212.

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certain sum of money; that *Evans* assigned the judgment to the relator's on the justice's docket, of which the justice had notice; that the judgment-debtor paid the amount of the judgment to the justice; that the relators, before the commencement of the suit, demanded the money of the justice at his office, and that payment was refused.

The defendants pleaded as follows: 1, *Nil debet*; 2, *Nul tiel record*; 3, That the judgment-debtor had not paid the judgment; 4, That the money had not been demanded of the justice; 5, That the money received by the justice, in payment of the judgment, was in bank notes of the State Bank of *Illinois*, which notes, at the time they were so received, were current in the State of *Indiana*, and receivable in some of the branches of the State Bank of said State, and which notes the justice had tendered to the relators, &c.; 6, The same with the 5th; 7, That the judgment had not been transferred to the relators; 8, The same with the 7th.

The seventh and eighth pleas were correctly rejected, [*273] on *the plaintiff's motion, they not being sworn to.

The first, fifth and sixth pleas were demurred to, and the demurrer sustained. The first plea is bad, the suit being on a bond. The other pleas demurred to are also bad. The justice had no authority, without special directions from the judgment-creditor, or person entitled to the judgment, to receive anything in payment of the judgment but gold or silver. *Const. U. States*, art. 1, sect. 10. By receiving bank notes in payment, without such directions, the justice rendered himself liable to the plaintiff, in lawful money, for the amount received.(1)

Issues were joined on the second, third and fourth pleas. The cause was tried by a jury, and a verdict and judgment were rendered for the plaintiff.

The plaintiffs in error contend that the suit could not be sustained for the use of the relators, the judgment not being assignable. We think, however, that the statute of 1838 authorized such an assignment of the judgment as would justify the present action. R. S., 1838, p. 376, sect. 56.

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Several instructions asked for by the plaintiff were given, and one asked for by the defendants was refused. These instructions need not be examined, as the record contains the evidence, and shows clearly that the issues of fact were rightly decided. There was, however, one issue, viz., that on the plea of *nul tiel record*, which should have been tried by the Court. It was, to be sure, the judgment of a justice of the peace that was in question, but his Court must be considered as a Court of record. A Court that is bound to keep a record of its proceedings, and that may fine or imprison, is a Court of record. 3 Blacks. Comm., 24. A justice's Court is within that definition.(2)

Per Curiam.—The judgment is reversed. Cause remanded, &c.

R. A. Chandler, for the plaintiffs.

B. F. Gregory, for the defendant.

(1) A marshal has no right to receive anything in discharge of an execution but gold or silver, unless by the authority of the plaintiff. *Griffin et al. v. Thompson*, 2 Howard, 244; *McFarland v. Gwin*, 3 Id., 717.

(2) In *New Jersey*, a justice's Court is, by the terms of the statute, a Court of record. *Hinchman v. Cook*, 1 Spencer's R., 271.

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RICKETTS v. ASH.

TENANTS HOLDING OVER—JURISDICTION.—The jurisdiction of the justices of the peace, under the act of 1838, concerning tenants holding over, is not limited as to the amount of damages.

SAME—STATUTE CONSTRUED.—That statute only authorizes proceedings for the recovery of the possession of real estate, and damages for its detention. It has no relation to personal property.

ERROR to the *Putnam* Circuit Court.

BLACKFORD, J.—This is a proceeding instituted by *Ash*, before two justices of the peace, under the statute of 1838, concerning tenants holding over. The complaint states that the plaintiff leased to the defendant a certain house and lot, which

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are described, and the goods and chattels and household furniture then in the house, for one year, in consideration of the sum of \$200 for the rent of said premises; that the defendant entered on the premises and possessed the same for said term, which had long since expired; that the plaintiff had, on, &c., demanded possession of the premises, which demand had been refused. Damage, \$100. The defendant having appeared, the suit was tried, and judgment rendered for the plaintiff.

The defendant appealed to the Circuit Court. The cause was there tried, and the following verdict given, viz.: The jury find that the plaintiff is entitled to the legal possession of the premises in the complaint mentioned, and assess the plaintiff's damages for the unjust detention thereof at the sum of \$60.00. Judgment as follows: It is therefore considered that the plaintiff recover against the defendant the possession of the said premises, together with the sum of \$60.00, his damages as aforesaid assessed for the unjust detention thereof, &c.

The defendant contends that the justices have no jurisdiction in a case for so large a sum as that claimed as damages in this case. This objection is untenable, there being no limit in the statute as to the amount of damages that may be claimed. The judgment must, however, be reversed on another ground. The complaint is that the plaintiff had leased to the defendant a certain house and lot, and goods and chattels and household furniture in the house, in consideration of the sum of [*275] \$200 for the rent of said premises. It is *evident that the word premises there means both the real and personal property leased. The verdict is, that the plaintiff was entitled to the premises in the complaint mentioned, that is, the said real and personal property; and the judgment is for the possession of the said premises, plainly meaning all the property alleged to have been leased. It thus appears, that the plaintiff claimed the possession of personal as well as real property, and has obtained a verdict and judgment for the possession of both, and damages for the detention of both. The statute, under which the complaint was filed, only authorizes this preceeding for the recovery of the possession of real estate, and damages

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for its detention. It has no relation whatever to personal property. R. S., 1838, p. 584.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiff.

J. Cowgill, for the defendant.

STEPHENS and Another v. LAWSON.

FAILURE OF OFFICER TO ALLOW EXEMPTION.—If a constable having levied an execution on the debtor's goods, refuse to permit him, he having a family, to retain \$100 worth thereof as exempt from execution, but sell the same on the execution, he may be sued in trespass.^(a)

PRACTICE.—If objectionable testimony admitted by the the Circuit Court, do not appear to have been objected to, it will be presumed that it was admitted by consent.

ERROR to the *Monroe* Circuit Court.

SULLIVAN, J.—Trespass by *Lawson* against the plaintiffs in error, for taking and carrying away and converting to their own use certain goods and chattels belonging to the plaintiff, of the value of \$54. Plea, not guilty. Verdict and judgment for the plaintiff below.

At the trial, the defendants were permitted, without objection from the plaintiff, to prove that the goods and chattels above-named were seized by virtue of an execution of *fi. fa.* on a judgment against the plaintiff, &c. The plaintiff then offered to prove, that he thereupon claimed the property [*276] *described in the declaration as exempt from execution, under the statute which allows execution-debtors to claim certain property as exempt from execution, &c. The defendants objected, but the Court admitted the testimony.

During the progress of the trial, the Court instructed the jury that the plaintiff, if he had a family, had a right to claim

(a) See *Mandlove v. Burton*, 1 Ind., 39.

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property of the value of \$100 as exempt from execution, and that if he did, in the present case, claim from the defendant, *Stephens*, the constable, \$100 worth of property as described in the declaration, after the levy and before the sale, and the constable refused to allow it, he was liable to the plaintiff in the present form of action. To that instruction the defendants except.

The proof offered by the defendants in justification of the trespass, if the objection had been made, should not have been received under the general issue. But as the testimony was not objected to, we presume that it was admitted by consent. The only question in the case then is, whether trespass is the proper action against a constable who, having levied on property as above stated, refuses to allow the execution-defendant, if he have a family, to select and retain \$100 worth of it as exempt from execution.

We think the action is well brought. The refusal of the officer to allow the execution-defendant to retain the property claimed as exempt from execution, and the sale of it after he was informed of the defendant's request, were such an abuse of his authority as amounted to a trespass. The seizure was lawful, but when the property was claimed as exempt from execution, the levy was, by operation of law, discharged, and the subsequent retention and sale of it by the officer were without authority. The general rule is, that although the conduct of an officer in the first instance be lawful, yet if he abuse his authority, and commit some act of trespass not warranted by the process, he is a trespasser from the beginning. *The Six Carpenters' Case*, 8 Co., 146; *Shorland v. Govett*, 5 B. & C., 485; *Adams v. Freeman*, 12 J. R., 408.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs.

C. P. Hester, for the plaintiffs.

J. S. Watts, for the defendant.

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PRACTICE.—Debt on a promissory note Plea, the general issue. The defendant proved that the note had been given in consideration of the payee's assignment to him of his right to certain fees, but he did not show they had not been collected. *Held*, that the proof was not sufficient to defeat the suit.

ERROR to the *Lawrence* Circuit Court.

SULLIVAN, J.—Debt on a promissory note commenced before a justice of the peace. Plea, the general issue, sworn to. Judgment in the Circuit Court for the defendant.

The proof was, that the note was given for the defendant to one *Stickney*, the plaintiff's assignor, in consideration that the latter had assigned to the former his right to certain fees on the docket of *William Blair*, a justice of the peace, a list of which is contained in the bill of exceptions. The indorsement of the note by *Stickney*, and the possession of it by the plaintiff, were also proved. The right of *Stickney* to the fees sold was not denied; and there was no evidence to show that they had not been collected by the defendant.

On those facts, the Court erred in giving judgment for the defendant. It devolved upon the latter to show that the fees had not been collected, and that they had not been collected without fault on his part. Whether they were collected or not does not appear. There was no evidence to that point. The *onus* lay upon the defendant, and the proof, if any existed, was, manifestly, within his reach. The defendant can not avoid the note, and retain the fees for which it was given.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. P. Hester, for the plaintiff.

G. G. Dunn, for the defendant.

DOUGHERTY and Another v. THOMPSON.

LANDLORD AND TENANT HOLDING OVER.—*T.* filed a complaint before two justices of the peace before *D.* and *J.*, as tenants of certain premises, for holding over, &c. The damages claimed were \$100. Plea, not guilty.

The following were the facts: The premises had been conveyed in [*278] fee-simple by *D.* to *T.*; and, by a sealed instrument of the same date with the conveyance, executed by the plaintiff and defendants, the plaintiff, in consideration, &c., had “leased, rented, and to farm let” the premises to the defendants, from the date thereof until, &c., and had agreed to pay *D.* \$100 at the end of the term,” on the express condition” that the defendants should surrender the premises to him at or before that time, and had agreed also that, should *D.*, on or before that time, pay him a certain debt, &c., he would permit *D.* to remain in possession, and would release to him all his interest in the premises; and the defendants had agreed that they would use the premises in a husbandlike manner, would commit no waste, and would, at the end of the term, deliver possession to the plaintiff if *D.*, in the mean time, should fail to pay him said debt.

Held, that the claim of \$100 did not exceed the jurisdiction of the justices; and that the title to real estate was not involved in the cause. *Held*, also, that, to maintain the suit, it was not necessary that the plaintiff should have made an actual tender to *D.* of the \$100. *Held*, also, that the agreement between the plaintiff and defendants created between them the relation of lessor and lessees.

APPEAL from the *Orange* Circuit Court.

DEWEY, J.—This was a complaint filed before two justices of the peace by *Thompson* against *Dougherty* and *Johnson*, for holding over their term as tenants. Damages claimed, \$100. Plea, not guilty. Verdict and judgment for the plaintiff.

On the trial, the plaintiff read in evidence a deed executed by *Dougherty* conveying to him the premises in question in fee-simple. He also read a sealed instrument of the same date with the deed, executed by himself and by *Dougherty* and *Johnson*. By that instrument, the plaintiff, in consideration of \$50.00 paid him by *Dougherty* and *Johnson*, “leased, rented, and to farm let” to them the land and appurtenances in controversy, from the 16th day of *March*, 1843, (the date of the deed and of the other instrument) until the first day of *Sep-*

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tember following. And the plaintiff covenanted as follows: That he would pay *Dougherty* \$100 at the expiration of the term, "on the express condition" that *Dougherty* and *Johnson* surrendered to him peaceable possession of the leased premises, on or before the day of the expiration of the term; that, should *Dougherty*, on or before that day, pay to him certain sums of money, amounting to \$1,418.70, which he owed him, the plaintiff would suffer *Dougherty* to remain in possession, and would release to him all the plaintiff's interest in the land.

[*279] *Dougherty* and **Johnson* covenanted that they would use the premises in a husbandlike manner, would commit no waste, and would, at the expiration of the term, deliver possession to the plaintiff should *Dougherty*, in the meantime, fail to pay the plaintiff the money which he owed him.

The defendants asked the Court to instruct the jury as follows: 1, That they must find for the defendants, because the damages claimed in the complaint being over \$100, and the title to real estate being put in issue, the justices had no jurisdiction of the cause. 2, To entitle the plaintiff to recover, he must have proved that he tendered \$100 to *Dougherty* on the 1st of *September*, 1843, at the close of the day; and that he had brought the money into Court. 3, That the deed from *Dougherty* to the plaintiff, and the other instrument executed by the plaintiff and by *Dougherty* and *Johnson*, constituted a mortgage to the plaintiff; and that a mortgagee could not maintain this action to recover possession of the mortgaged premises. The Court refused all the instructions, and we think correctly.

1, The general law regulating the jurisdiction of justices of the peace is not applicable to this case. The statute on which this proceeding is founded, authorizes the jury, trying the cause, to assess such damages for the unjust detention of the premises as they may deem reasonable, and the justices are required to render a judgment accordingly. R. S., 1838, p. 584; R. S., 1843, p. 819. The jurisdiction of the justices is not limited as to the amount of the damages. *Ricketts v. Ash*, at this term. There was no pretence that the title to real

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estate was involved in the trial. The only questions were, had the relation of landlord and tenants subsisted between the plaintiffs and the defendants? and did the latter hold over their term? And, besides, if the justices had no jurisdiction, the motion should have been to dismiss the cause, not to instruct the jury. 2, No question of tender belonged to the cause. Admitting that by the agreement which was given in evidence, the payment of the \$100 by the plaintiff, and the surrender of the premises by the defendants, were to have been concurrent acts, (a matter which we do not decide,) still the plaintiff was not bound to make an actual tender; all that could [*280] have been required of him was to *offer to pay the money upon the surrender of the premises; and as he was not bound to make an unconditional tender, he was under no obligation to have the money in Court. Besides, the evidence showed that the defendants neither surrendered the possession, nor offered to do so, on any terms. *Dougherty* of course had no claim to the \$100. Admitting that the deed executed by *Dougherty* to the plaintiff, and the article of agreement executed by the plaintiff and by the defendants, constituted a mortgage between *Dougherty* and the plaintiff—and they certainly bear some strong features of a mortgage—still, we think the Court did right in refusing to instruct the jury that they amounted to a mortgage, and that the plaintiff could not as a mortgagee maintain this action for possession. It was not as a mortgagee, but as a landlord, that he demanded the possession. And though the two instruments taken together may amount to a mortgage between *Dougherty* and the plaintiff, the defeasance, if it be such, certainly creates the relation of lessor and lessees between the plaintiff and the defendants. The third instruction, therefore, was properly refused because it was not relevant to the case. And besides, it implied that the instruments referred to amounted to nothing but a mortgage, and should not for that reason have been given.

Per Curiam.—The judgment is affirmed with costs.

J. Collins, W. Quarles, and J. H. Bradley, for the appellants.

H. P. Thornton, for the appellee.

THE STATE v. ELLIOTT, in Error.

IN an indictment for an assault and battery, it is unnecessary to allege that the person beaten was in the peace of the State; 3 Chitt. C. L., 821, n. c.; nor are the words "force and arms" necessary in the description of the offense. 1 Id., 241.

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CREELMAN v. MARKS.

SLANDER.—Slander for several sets of words, (with a *colloquium*, &c.,) some of which charged the plaintiff with having sued the defendant on a note he had never signed, &c.; the others, with having signed the defendant's name to said note without his permission, &c. *Held*, that the suit would lie for the latter words, but not for the former.

SAME—PLEADING.—To said words charging the plaintiff with signing the defendant's name to the note without his permission, a plea that the plaintiff did sign the defendant's name to said note, without his permission, was held to be good.

SAME—PRACTICE.—It is not sufficient in such action that the words proved have the same meaning with those laid. All the words laid need not be proved, but so many of them must be proved as will support the action.

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—*Marks* brought an action of slander against *Creelman*. The declaration avers that on, &c., the defendant made his promissory note to the plaintiff and another person for a certain sum of money; that a suit was pending on the note; that the defendant knowing the premises, and intending, &c., heretofore, to wit, on, &c., in a certain discourse of and concerning the plaintiff, and of and concerning said note, and of and concerning said suit, falsely and maliciously, in the presence and hearing, &c., spoke and published of and concerning the plaintiff, and of and concerning said note, and of and concerning said suit, the false, malicious and defamatory words following, that is to say: 1, "He (meaning the plaintiff) has sued me upon a note of hand (meaning the note above

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described) that I never signed, either by putting my name or mark to it, or ordering it to be done." 2, "He (meaning the plaintiff) signed my name to said note (meaning the note above described) without my permission." 3, "I never signed said note," (meaning the note above described.) 4, "He (meaning the plaintiff) has committed forgery." 5, "The said note (meaning the note above described as executed by the defendant) is a forgery." Thereby then and there meaning that the plaintiff had been and was guilty of forging said note.

There was a demurrer to each of said sets of words, which was correctly overruled as to the second and fourth sets, and correctly sustained as to the others.

Pleas: 1, Not guilty. 2, That the words were true, [*282] &c. *3, To the words, "He (meaning said plaintiff) signed my name to said note (meaning the note above specified) without my permission," the defendant says *actio non*, because he says that the plaintiff did, on, &c., at, &c., sign the defendant's name to said note without his permission; wherefore, &c. Replication, *de injuria*, to the second plea, and a general demurrer to the third, which demurrer was sustained. The issues in fact were tried by a jury, and a verdict and judgment rendered for the plaintiff.

We think the third plea is good, though the second set of words should not be considered actionable without the prefatory allegation and *colloquium* in the declaration relative to the note, as we understand the words "the said note" used in the plea to refer to the note mentioned in that set of words, and in the prefatory allegation and *colloquium*. The demurrer to that plea should have been overruled.

There is also an error in one of the instructions to the jury. The Court instructed the jury that "a charge that *Marks* had signed my name to a note without my leave, and I call that forgery," is substantially the same as the charge "*Marks* has committed forgery." The jury would understand from that instruction that the last-named words, which are the fourth set in the declaration would be proved by evidence of the speaking of the words first above named; but that is not the law. The

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circumstance that the words proved have the same meaning with those laid is not sufficient. All the words laid need not be proved, but so many of them must be proved as will support the action. *Wheeler v. Robb*, 1 Blackf., 330; *Linville v. Earlywine*, 4 Id., 469.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker and J. S. Newman, for the plaintiff.

C. B. Smith, for the defendant.

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*SPEARS v. CLARK.

DUE DILIGENCE.—The assignor of a promissory note can not complain that the assignee's suit against the maker was not commenced in time, if judgment was obtained on the note at the first term of the Court after the assignment.

SAME.—A *fieri facias* on such judgment should be issued within a reasonable time after the close of the term at which the judgment was rendered.

SAME.—Where the judgment in such case was rendered on the 21st of *August*, and the execution issued on the 21st of *September* following, it was held (the time when the Court adjourned not being shown) that the execution did not appear to have issued in time to bind the assignor.

APPEAL from the *Tippecanoe* Circuit Court.

BLACKFORD, J.—*Clark* sued *Spears* in assumpsit. The declaration contains three counts. The first is on the assignment of a promissory note, payable in 1838; the second for money had and received; and the third for money paid. Plea, the general issue. Verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict.

The first count, on which alone any evidence was given, alleges, among other things, that judgment was obtained against the makers of the note, in the *Tippecanoe* Circuit Court, at the *August* term, 1839, and that that was the first term after the assignment sued on was made, the assignment having been made in the summer of 1839. This count also alleges that a

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feri facias on the judgment was issued on the 21st of *September*, 1839, and was returned no property found.

The evidence respecting the first of these allegations was as follows: The defendant's assignment of the note is without date. He was himself an assignee, and the assignment to him was dated in 1838. It was proved that the plaintiff left this State in 1837, and resided in *Arkansas* till the winter of 1839; that he did not return to *Tippecanoe* county, where the defendant was, until after the close of the *February* term, 1839, of the Circuit Court of that county; and that the defendant had admitted, in the presence of two persons, that the judgment on the note had been obtained at the first term of the Court after his indorsement was made. It was proved, as to the second allegation, that the judgment against the makers of [*284] the note was rendered on the 21st of **August*, 1839, the third day of the term, and that the execution issued on the day stated in the declaration.

The Court instructed the jury that, if the judgment was obtained at the first term after the defendant's assignment, and if the execution issued at the time set out in the declaration, there was evidence of due diligence.

It is contended that the suit against the makers of the note was commenced too late. If, however, the judgment was obtained at the first term after the assignment sued on was made, the suit must be considered as having been commenced in time; *Kelsey v. Ross et al.*, 6 Blackf., 536; and we think there was sufficient evidence in this case to authorize the jury in finding that the judgment had been so obtained.

It is also contended that the execution was not shown to have been issued in time; and that objection is well founded. The plaintiff was entitled to a reasonable time to take out execution after the adjournment of the Court in which the judgment was rendered. The time of the adjournment was not proved; and if it took place directly after the rendition of the judgment, there was too much delay in taking out execution. If, on account of the continuance of the term, the execution was ordered in time, such continuance should have been proved.

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There is also an objection to the first count, as it does not show that the execution issued in time.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, for the appellant.

R. A. Chandler, for the appellee.

SCOTT and Others v. McMURRAN and Others.

MORTGAGE, RECORDING OF.—Bill of foreclosure. A mortgage of real estate, given to secure the payment to the complainant of a *bona fide* debt, was not recorded until about two years and a half after it was executed. After its execution, and before it was recorded, the mortgagor contracted debts with other persons, for which, but not until after the mortgage was recorded, judgments were obtained. There was no satisfactory evidence that the delay to have the mortgage recorded proceeded from any collusion [*285] between the mortgagee and mortgagor to defraud the subsequent creditors. *Held*, that the mortgagee was entitled to the priority.(a)

APPEAL from the *Vigo* Circuit Court.

SULLIVAN, J.—Bill of foreclosure. The bill states that one *William McMurran* was indebted to *William C. Linton* in his lifetime in a large sum of money, to wit, the sum of \$3,000, which remained unpaid at the death of said *Linton*; that on the 20th of *April*, 1838, *McMurran* executed to *Freeman H. Linton* and others, infant heirs of *William C. Linton*, his three several promissory notes for the amount due, and, to secure the debt, also executed to them, on the 12th of *October*, 1838, at the request of *Lucius H. Scott*, their guardian, a mortgage on the property described in the bill, which was duly acknowledged on the next day, and, on the 9th of *April*, 1841, was recorded in the recorder's office in the county of *Vigo*. On the 20th of *November*, 1840, *Scott*, as the guardian of *Linton's* heirs, and *McMurran* had a settlement of accounts, and it was found that the latter was, after deducting sundry payments, still in-

(a) *Blackmore v. Taber*, 22 Ind., 466.

debted in the sum of \$2,085.34; whereupon the original notes were given up to *McMurran*, and three other notes, one for \$1,000, one for \$835.34, and another for \$250, were given, payable to *Scott*, guardian, &c., as evidences of the balance still due of the original debt. The bill states the death of *Freeman H. Linton*, intestate and without issue, and the intermarriage of *Scott* and *Eliza Linton*, the widow of *William C. Linton*. It avers the non-payment of the debt found due by the settlement above-stated, and prays a decree against *McMurran* for the debt, and a foreclosure, &c.

At the *November* term, 1841, of the *Vigo* Circuit Court, *Chauncey Rose* and *Henry Rose*, who represented themselves to be judgment-creditors of *McMurran*, petitioned the Court to be made defendants to the bill. The prayer of the petition was allowed, as it seems, without objection, and they thereupon filed their joint answer. They say that said mortgage was fraudulent in its inception, and that it was fraudulently concealed, from its date until it was recorded on the 9th of *April*, 1841, from the public generally, and especially from those doing business with *McMurran* and extending [*286] *credit to him, so as designedly to deceive and defraud them. They say that on the 9th of *November*, 1840, *Chauncey Rose*, under the belief that *McMurran* was the true and *bona fide* owner of the real estate described in said mortgage, and that it was unincumbered, indorsed for him to the amount of \$700, which sum he has been obliged to pay, and that *McMurran* became indebted to him also on other accounts. They say that *McMurran* also became indebted to *Henry Rose*, by promissory note bearing date *June* the 4th, 1840, for the sum of \$217, at the date of which he also was ignorant of said pretended mortgaged, &c. They say that, being deceived by the fraudulent concealment of said mortgage, they omitted to use the remedies in their power to secure the debts owing to them, until, if the mortgage be permitted to stand, it is too late. They deny notice of the existence of the mortgage until it was furnished by the record, and say that they have obtained judgments, &c. *McMurran* failed to answer, and to the

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answer of *C. and H. Rose* a special replication was filed. Depositions were taken, the substance of which is as follows:

S. B. Gookins swears, that he was present at the execution of the mortgage from *McMurran* to the heirs of *Linton*, and was one of the subscribing witnesses to the deed. The mortgage was drawn by his partner, *Mr. Farrington*, according to dates, amounts, &c., furnished by *Scott* and *McMurran*. Before *McMurran* signed the mortgage, something was said about recording it. *McMurran* objected to the deed going upon record, saying that he did not wish his wife to know of its existence. *Scott* insisted on recording it, and *McMurran* refused to sign it until there should be some understanding "on the subject." After further conversation, *McMurran* consented to execute the mortgage, and it was agreed between the parties, that it should be left with *Farrington*, *Wright*, and *Gookins*, attorneys at law, to be put upon record whenever they should think it necessary or expedient to do so. The notes also, which the mortgage was given to secure, were left with them. Payments were made by *McMurran* from time to time, which were indorsed on the notes. One of the payments was a sum of money borrowed by *McMurran* from the commis-
[*287] sioners of the sinking fund. *Nothing was said by either of the parties about the mortgage until the 9th of April, 1841. Up to that date, witness considered *McMurran* solvent, and believes he was generally so considered; he (the witness) had frequently indorsed for him in bank, and never knew him to be under protest until that date, and knew of no reason why the mortgage should be put upon record until that time. On that day witness understood that *McMurran* was about to make an assignment of all his property in trust for certain creditors, and being informed that the debt to *Linton's* heirs was not fully paid, he then delivered the mortgage to the proper officer to be recorded. Witness says that the only objection *McMurran* made to recording the mortgage was that he did not wish his wife to know it; he did not object to it for the reason that it might injure his credit.

J. Farrington, who drew the mortgage, knows nothing of

the agreement between *McMurran* and *Scott*, that it should then be recorded.

D. Deming swears that on the 22d of *May*, 1840, he acted as the agent of the commissioners of the sinking fund; that, on that day, *McMurran* borrowed \$500 from that fund, and mortgaged a part of the same property that he had previously mortgaged to *Linton's* heirs. Witness was applied to by *L. H. Scott* to know if *McMurran* could borrow money from the sinking fund. Witness replied that *McMurran's* property was incumbered. *Scott* said no; *McMurran* could mortgage it. Witness then said that if *McMurran* would make out the papers, he could have the money. Witness further states that *McMurran's* mortgage to the sinking fund was in part filled up in the handwriting of *Scott*. He also identifies the mortgage, which is made part of his deposition.

The Circuit Court decreed that the mortgage to *Linton's* heirs was fraudulent as to *C.* and *H. Rose*, and that they were entitled to a priority in payment, &c.

There is no proof to sustain the allegation in the answer that the mortgage to *Linton's* heirs was fraudulent in its inception. It is very clear that there was a *bona fide* debt due to them, and, when the mortgage was executed, it was intended to secure that debt. If the defendants, *C.* and *H. Rose*, are entitled to relief, it is because an imposition has [*288] *been practised upon them by the collusion of *Scott* and *McMurran*, which could not be guarded against by the exercise of ordinary diligence. The statute which provides for recording mortgages, and which was in force at the dates of the several transactions between the parties in this case, extends no protection to creditors if that ceremony should be omitted. It provides that if a mortgage shall not be recorded within ninety days after its execution, it shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such deed or conveyance be recorded before proving and recording the deed under which such subsequent purchaser or mortgagee may claim. Under the statute it is not necessary to the validity of a mortgage

that it be recorded at all. If the mortgagee omits to have it recorded, he runs the risk of losing his lien as against purchasers and mortgagees, and so he may hazard it as against a judgment-creditor, but as to all the world beside, his lien is complete. If this case, then, were to be decided upon the statute, the complainants would be entitled to a decree because the mortgage to them was prior in date, and was recorded before the defendants became judgment-creditors. Where parties have equal equities, he who is prior in time shall have priority of right.

There is a class of constructive frauds against which equity will relieve, and within which the defendants say this case falls. As, for example, where a person having a conveyance of land keeps it secret an undue length of time, and knowingly suffers a third person afterwards to purchase the land, and to expend money upon it, without notice of his claim. In such a case, the wrong-doer shall be the sufferer. But there must be something more than mere *concealment* to give the character of fraud to the transaction, for concealment may be compatible with entire innocence of intention. *Evans v. Bicknell*, 6 Ves., 174; *Barnett v. Weston*, 12 Ves., 130; *Tourle v. Rand*, 2 Bro. Ch. R., 650; *Griffin v. Stanhope*, Cro. Jac., 454. This case, however, does not come within the class referred to, because the defendants set up no claim to the land, nor do they pretend that they made any contract with the mortgagor in reference to it. They say that they became his creditors in confidence that he [*289] was the owner of *the lands which they afterwards found were mortgaged to the complainants. But this is only saying that they reposed in *McMurran* a misplaced confidence. Suppose they had loaned money to *McMurran* under the same belief, and taken a mortgage on the same lands, would not the first mortgagees have had the preference, if they had caused their mortgage to be first recorded, no matter at what length of time after it was executed? They would, if the only objection to their mortgage was mere delay to put it upon record.

We think the facts in this case do not amount to collusion.

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Mr. *Gookins* is the only witness that explains the intention of the parties. He says that the mortgage was withheld from record at the request of *McMurran*, and to keep the transaction from the ears of his wife. *Scott* consented to it, with the understanding that it should be put upon record whenever it became necessary. By which we understand that he would not consent to any act that would hazard the debt, and that the mortgage should be put upon record before any other lien attached. It does not appear that any doubt was entertained of *McMurran's* solvency until the 9th of *April*, 1841, on which day the mortgage was recorded. On the contrary, it is expressly proved that *McMurran* was considered, until then, able to pay his debts; that *Gookins*, who knew of the existence of the mortgage, indorsed for him, and never knew him to be under protest until the day last named. Indeed, the defendants in their answer say that, had they known the true condition of *McMurran's* property, they might have secured themselves. The testimony of Mr. *Deming* is relied on to prove the fraudulent concealment. But the only effect that *Scott's* conversation with *Deming* can have, is to give to the mortgage to the commissioners of the sinking fund, a preference over the first mortgage.

We do not think it necessary to inquire to what extent the rights of the infant mortgagees should be affected by the acts of *Scott*, in delaying to have the mortgage recorded, or in representing to *Deming* that *McMurran* could mortgage the property to the commissioners of the sinking fund. Even admitting that his conduct in that particular was binding on his wards, [*290] we still think there are wanting those evidences *of fraud, or gross negligence amounting to fraud, which would give to the creditors the preference they ask.

Upon the whole case, therefore, we are of opinion that the complainants have a prior lien on the property and are entitled to a decree.

The Court reversed the decree with costs, and rendered a decree conformably to the foregoing opinion.

A. Kinney and *S. B. Gookins*, for the appellants.

W. D. Griswold and *J. P. Usher*, for the appellees.

Kinsey v. Grimes.

KINSEY v. GRIMES.

BILL IN EQUITY—PRACTICE.—A bill in equity alleging a certain contract, which is denied by the answer, is not sustained by proof of a different contract.

INSTRUCTIONS TO JURY.—If a refusal of instructions to the jury would be right under any supposable state of facts, it can not be assigned for error.(a)

EQUITY PRACTICE.—An issue of fact having been formed on bill and answer in equity, a jury was called to try it, and the answer read in evidence. *Held*, that the jury might find for the complainant on the testimony of a single disinterested witness.

ERROR to the Wayne Circuit Court.

DEWEY, J.—*Kinsey* filed a bill in equity against *Grimes* to enforce a mechanic's lien. The bill, among other things, alleges that *Grimes* purchased of *Kinsey* 17,600 bricks, with which he erected a dwelling-house; that the bricks were bought on a credit of six months, at the price of \$4.00 per thousand, amounting to \$70.40, in which sum *Grimes* was indebted to *Kinsey*. *Grimes*, in his answer, denies the purchase of the bricks of *Kinsey*, and all indebtedness to him. There was a general replication. A jury was called to try the issue formed by the bill and answer, with respect to the purchase of the bricks, and *Grimes'* indebtedness to *Kinsey* for them. Verdict for the defendant, and the bill dismissed.

The evidence is not spread upon the record; but it appears by a bill of exceptions that the defense set up by *Grimes* was, that the bricks which he used in building his house were purchased of *Kinsey* by one *Thorp*, who was indebted to [*291] *Grimes*. We are further informed that there was *evidence tending to prove that *Kinsey* would not trust *Thorp* for the bricks, unless *Grimes* would be his surety.

Kinsey requested the Court to instruct the jury, that if *Grimes* took the bricks from *Kinsey's* kiln, without informing him that he had consented to be surety for *Thorp*, he was himself responsible for their value, and could be held liable in this

(a) *Clark v. Willbridge*, 5 Ind., 176.

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action. The Court refused to give the charge. We think the refusal was correct. The contract alleged in the bill is, that *Grimes* purchased the bricks of *Kinsey* at a stipulated price, and on a certain credit. If *Grimes* became liable to *Kinsey* by contract for taking the bricks, under the circumstances supposed in the instruction asked for, it was on an implied promise to pay for them, on demand, at their reasonable value. Proof of such a promise would not support the bill, which alleged a different contract. It would, therefore, have been improper for the Court to have charged the jury, that *Grimes* could be held liable in this action on the implied promise.

Kinsey also asked the Court to instruct the jury, that the admissions of the defendant were legal evidence in favour of the plaintiff, the record showing that there was testimony to which the instruction, if given, would have applied. The Court refused so to charge. If, under any supposable state of facts, the refusal of the Court to instruct as asked could be justified, we are bound to presume that those facts existed. If the admissions alluded to in the rejected charge were made to avoid litigation, they were not legal evidence, and the refusal was correct.

Among the instructions given by the Court was the following: That to entitle the plaintiff to a verdict, he must have established the claim alleged in the bill by two witnesses, or by one witness and *strong* corroborating circumstances.

It is usual in equity practice, where a fact alleged in the bill is plainly denied by the answer, and supported but by one witness and circumstances of corroboration, to send the issue to be tried at law; and to direct that the answer be read in evidence to the jury. And it seems that, without such direction, the answer would not be evidence, for it is contrary to the rules

governing Courts of common law, to suffer a party to [*292] make evidence for himself. *Glynn v. The *Bank of England*, 2 Ves., 38; *Gresley's Eq. Ev.*, 156; *Arnot v. Biscoe*, 1 Ves., 95; *Ibbotson v. Rhodes*, 2 Vern., 554. The statute on which this bill is founded provides that the Court, on the application of either party, may direct an issue to be

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made, and a jury to be called to try it, as in other cases at law. R. S., 1838, p. 412. But there is no provision that the answer of the defendant shall go to the jury, or what shall be its effect on the trial. No question, however, arises in this cause as to the admissibility of the answer. It went to the jury without objection; and the only inquiry is, what is to be its effect? In a Court of equity, the answer, distinctly denying the fact alleged in the bill, stands on the footing of the testimony of a disinterested witness, and, when it is opposed to single evidence only on the part of the plaintiff, must prevail. No decree can be given against it. But when the answer is thus considered, it is going too far to say that to weigh it down, the testimony of one witness and *strong* corroborating circumstances are at least necessary; slight corroboration is sometimes sufficient. *Gresley's Eq. Ev.*, 4. But the answer has not the same weight before a jury trying an issue at law, that it has before the chancellor. The jury have the right to view it with the suspicion which attends the testimony of an interested witness, and to give it such credit as they may think it deserves. *Glynn v. The Bank of England, supra*; *Gresley's Eq. Ev.*, 157. It follows from this principle, that the jury, if in their opinion the uncorroborated testimony of a single disinterested witness is entitled to greater weight and credibility than the answer, may find a verdict against the latter. The charge of the Court to the contrary was incorrect.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

C. H. Test, for the defendant.

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CONTRACT—REVERSAL OF JUDGMENT.—*A* having obtained judgment against *B* for a certain sum of money, gave *C* a written authority to collect a certain part of the amount in *A*'s name, and apply it to his *C*'s own use. *C* received

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from *B* the amount of the order, and bound himself in writing to *B* to repay him the amount so received if the said judgment should be reversed. The judgment was afterwards reversed, and *B* sued *A* in assumpsit for money had and received to recover back the money paid as aforesaid to *C*. *Held*, that the action could be sustained. *Held*, also, that interest in such case could only be recovered, under the statute, from the time the money was demanded.

PRACTICE—RECORD OF COURT.—An entry on the record of the Circuit Court of a decision of the Supreme Court, in a case taken by appeal from the Circuit Court, is necessary before any action of the last-named Court in the cause remanded from the Supreme Court.

SAME.—But when the question in a suit in the Circuit Court is, whether a judgment in another action had been reversed or not, the record of the Court that reversed the judgment, or an agreement of the parties that it had been reversed, is sufficient to prove the reversal.

APPEAL from the *Lawrence* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Foote* against *Glover* in *November*, 1841. There was a general count for money had and received. There was also a special count which was adjudged bad on demurrer; but as that count states the same facts that were proved under the general count, any further notice of it is unnecessary. Plea, the general issue. The cause was submitted to the Court, and judgment rendered at the *May* term, 1842, in favour of the plaintiff for \$308.63.

The following are the facts proved: In *April*, 1834, *Glover* recovered a judgment in the Circuit Court of *Monroe* county against *Foote* for \$629, exclusive of costs. Afterwards, in the same month, *Glover*, by an instrument of writing assigned \$300 of the judgment to *John H. Thompson*. By that instrument, *Thompson* was authorized to collect said \$300 in *Glover's* name, to receipt for the amount as *Glover's* attorney, and to appropriate the same when collected to his, *Thompson's*, own use. The next day after the instrument of assignment was executed, *Thompson* agreed with *Foote* to give him a receipt for the \$300 of the judgment, on *Foote's* paying him in cash \$240. The money was accordingly paid, and the following receipt *indorsed on said instrument, viz.:

“Received of *Winthrop Foote* \$300 on the judgment

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within named, with the understanding that should said judgment be reversed in the Supreme Court, \$240 of the above sum are to be refunded to the said *Foote*. April 12, 1834. *Joseph Glover*, by *John H. Thompson*, his attorney." Below this receipt, and on the instrument of assignment aforesaid, there is also the following indorsement: "I hereby bind myself personally, that, should the said judgment be reversed, the said sum of \$240 shall be punctually and honourably refunded. April 12, 1834. *John H. Thompson*." *Thompson* was an attorney for *Glover* in the suit in which the judgment was obtained, and received the assignment of \$300 as his fee in the case, having no authority to bind *Glover* for repayment to *Foote*, in any event of the money thus received. It is agreed by the parties that said judgment against *Foote* was reversed by the Supreme Court in August, 1837.

We think the plaintiff was entitled to recover. When a judgment which has been paid to the plaintiff is reversed, the money may be recovered back by the defendant in an action for money had and received. *Sturges v. Allis et al.*, 10 Wend., 354; *Clark v. Pinney*, 6 Cowen, 297; *Green v. Stone*, 1 Harr. & Johns., 405. The ground of the plaintiff's right to recover in these cases is that the consideration has failed on which the money was paid. The money here sued for was paid to *Thompson* on the order of the judgment-creditor, which is the same as to the question before us as if it had been paid to the creditor himself.

The defendant contends that the plaintiff, by receiving *Thompson's* individual undertaking to refund the money, should the judgment be reversed, waived his claim against the defendant; but that is not so. The undertaking only added the liability of *Thompson* to that of *Glover* for the money, in case of a reversal of the judgment. The defendant also contends, that it should appear that the judgment of reversal had been entered on the record of the Circuit Court before the commencement of this suit; but we think otherwise. Such entry is necessary before any action of the Circuit Court as to other proceedings in the cause remanded from the Supreme

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[*295] Court, but that is a different matter.⁸ *When a question, as is the case here, is made in ^{an} suit whether a judgment before rendered in another action had been reversed or not, the record of the Court that reversed the judgment, or the agreement of the parties that it had been reversed, must be sufficient to prove the reversal.

The only error in this record is in the amount of the judgment, which is larger than it should be. The interest on the money proved to have been received was calculated from the time when the judgment was reversed. That was wrong. Interest for money had and received was only recoverable, in this case, from the time when the money was demanded of the defendant; R. S., 1838, p. 336; and there was no other demand here than the commencement of the action. The plaintiff, therefore, was only entitled to judgment for the money received by *Thompson* on the defendant's order, with interest from the issuing of the writ in this suit to the time of the judgment in the Circuit Court.

If the proper amount be remitted, the judgment may be affirmed; it must otherwise be reversed.

DEWEY, J., having been of counsel in the cause, was absent.

Per Curiam.—A *remittitur* having been entered, &c., the judgment is affirmed.

C. P. Hester, for the appellant.

J. S. Watts, for the appellee.

GLOVER v. HORTON.

TRESPASS IN OBTAINING EXECUTION.—If one of two judgment debtors, who knows the judgment has been paid, procure a *fi. fa.* to issue on the judgment and assist in its execution on the other's goods, he is liable in trespass to the party injured.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—Trespass. The declaration contains two counts. The first is for breaking and entering the plaintiff's

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close; the second, for taking and carrying away his goods. The defendant pleaded the general issue; and two special pleas, one to each count. The plea to the first count states that on, &c., one *Seibert* obtained a judgment against the [*296] *plaintiff and the defendant, *Horton*, before a justice of the peace, on which an execution of *fieri facias* was issued, directed to a constable of the proper township, commanding him to levy, &c.; that, by virtue of said execution, the constable, and the defendant as his servant, and by his command, entered upon the premises of the plaintiff to levy as commanded, and by virtue thereof did levy, &c., which is the same trespass, &c. The plea to the second count is, substantially, the same as that to the first. The plaintiff replied, that the execution was issued by the procurement of the defendant; that, at the time it was issued, the judgment set out in the plea was fully paid and satisfied, which the defendant well knew; yet the defendant regardless, &c., wantonly caused said execution to be issued, and, under pretence of a valid execution, committed said trespasses, &c. Special demurrer to the replication, which was sustained by the Court, and judgment for the defendant.

The main point relied on in support of the judgment of the Circuit Court is, that, from the facts stated in the replication, the action should have been case and not trespass, and that the replication is, therefore, a departure from the matter set out in the declaration. This position we think is not tenable. The defendant does not stand in the situation of one who, maliciously and unduly, procures a writ to be issued against the goods or person of another, and afterwards has no personal concern in its execution. If this was all he did, there would be force in the defendant's objection. *Elsee v. Smith*, 2 Chitt. R., 304; *Lair v. Abrams*, 5 Blackf., 191; *Tuell v. Wrink et al.*, 6 Blackf., 249. But where a person procures irregular process to issue, and is also personally concerned in its execution, the case is different. The writ being void as to him affords him no protection, and he is a trespasser.

Trespass is the appropriate remedy for an act done under

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a judgment that has been set aside for irregularity. *Philips v. Biron et al.*, 1 Str., 509. By analogy, an act done under a judgment that has been satisfied, by a party having knowledge of the fact, would be a trespass. The case of *McGuinty v. Herrick*, 5 Wend., 240, is in point; and the case of *Brown v. Feeter*, 7 Id., 301, in which it was held that [*297] an *action on the case will lie against a party who issues execution on a judgment that is satisfied, does not conflict with this view of the law. It does not appear in that case that the party who issued the writ had any personal concern in its execution. It follows that the replication is not a departure from the allegations in the declaration. It maintains the declaration by showing that the excuse of the defendant for the trespass charged is unavailing.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and *L. Barbour*, for the plaintiff.

H. Brown, for the defendant.

BURTON v. BAXTER, for the Use of ENGLISH.

SALE OF NOTE SECURED BY MORTGAGE.—The sale of a promissory note secured by mortgage is an equitable transfer of the mortgage to the purchaser of the note; and he should, therefore, be a party to a bill to foreclose, &c.(a)

ERROR to the *Switzerland* Circuit Court.

DEWEY, J.—*Baxter*, suing for the use of *English*, brought a bill in equity, the object of which was the foreclosure of a mortgage given to secure the payment of two promissory notes. The mortgage was executed by *Lewis* and wife, and the notes by *Lewis*. The defendants to the bill were the mortgagors and *Burton*—the latter claiming the mortgaged premises by a conveyance from *Lewis*, alleged to be of a date prior to that of the

(a) *Stanley v. Beatty*, 4 Ind., 134.

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mortgage. The bill alleges that the complainant, the mortgagee and payee of the notes, sold them to *English*, for whose use and at whose request the suit was commenced. On final hearing, there was a decree of foreclosure and sale of the mortgaged premises, and for costs against the defendants.

This decree can not be sustained. The bill shows that the complainant had no equity. The sale of the notes, secured by the mortgage, to *English* was an equitable transfer to him of the mortgage. Rob. on Frauds, 272, 275. See, also, *Clearwater v. Rose*, 1 Blackf., 137, and *Slaughter v. Foust et al.*, 4 Blackf., 379. The beneficial interest in the [*298] notes and mortgage being in *English*, he should have been a party to the bill. *Park v. Ballentine*, 6 Blackf., 223.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. Dumont, for the plaintiff.

WALLACE and Another v. CLARK.

REPLEVIN BOND—PLEADING.—To debt on a replevin bond, a plea that the goods replevied belong to the principal obligor is bad.

SAME—EVIDENCE.—But on the execution of a writ of inquiry, after judgment in such suit for the plaintiff on demurrer, evidence of such ownership is admissible in mitigation of damages.^(a)

ERROR to the *Vigo* Circuit Court. Damages were assessed and judgment was rendered in the Circuit Court, in favour of *Clark*, the plaintiff.

SULLIVAN, J.—Debt on a replevin-bond by *Clark* against the plaintiffs in error. The condition of the bond is, that if *Joseph S. Wallace*, one of the plaintiffs in error, shall prosecute with effect and without delay a certain writ of replevin, sued out by him against *Clark*, and duly return the goods and chattels taken by the sheriff, &c., by virtue of said writ, if a

(a) *Denney v. Reynolds*, 24 Ind., 245; 25 Ind., 500; 22 Ind., 6.

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return shall be awarded, then said bond shall be void, &c. The breaches assigned are, that *Wallace* wholly failed to prosecute his suit with effect, &c., but, on the contrary, thereof, became and was nonsuit; and that *Wallace* has failed to return said goods and chattels, as by the judgment of the Court he was ordered to do. Plea, that the goods and chattels, named in the condition of the bond, were the property of *Joseph S. Wallace*. To this plea, there was a general demurrer, which was correctly sustained by the Court. *Sherry v. Foresman*, 6 Blackf., 56. On the execution of the writ of inquiry, the defendants in the Court below offered to prove, in mitigation of damages, that the property mentioned in the condition of the bond was the property of *Joseph S. Wallace*, and that *Clark* never had a title to it. The plaintiff objected, and the Court excluded the testimony.

The question before us is attended with some difficulty. [*299] Our conclusion however is, that the Court erred in rejecting the testimony. The determination of a replevin suit may or may not be conclusive of the right of property, according to the circumstance of the case. When the right of property is put in issue and decided on, it is then *res adjudicata*, and can not, on general principles, be again inquired into in a suit between the same parties. If, however, the right has not been tried, in remains, as a matter of course, an open question. The amount of damages in an action on a replevin bond, must depend very materially on the right of the plaintiff to possess and retain the property. If the property belonged to him, his damages would be according to its value. But if he had no right whatever to the property, he sustained no damage by the refusal of the obligor to return it. There is therefore a propriety, when the amount of damage is the question, in allowing the defendant to show that the plaintiff had no claim to the property.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. D. Griswold and *J. P. Usher*, for the plaintiffs.

A. Kinney and *S. B. Gookins*, for the defendant.

Wynn v. Kiser.

WYNN v. KISER.

JURISDICTION.—A transitory action may be commenced against a single defendant, in the Circuit Court of any county in which he may be found.^(a)

ERROR to the *Bartholomew* Circuit Court.

DEWEY, J.—Assumpsit. Plea in abatement, that the suit was commenced in the *Bartholomew* Circuit Court, and the process served in that county; that at the time of issuing and serving the writ, the defendant was a resident and citizen of *Jackson* county, and not liable to be sued in *Bartholomew*. Replication, that the defendant was found in the last named county, and the writ served upon him there. Demurrer to the replication sustained; and the cause dismissed.

The question is whether the plea is valid.

The defendant in error has not informed us upon what rule of law he relies to sustain the plea; and we know [*300] none *which can sustain it. The action is transitory, and against a single defendant; and we have no statute forbidding the plaintiff to sue him in the Circuit Court of any county in which he could catch him.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. A. Hammond, W. Herod, and S. Major, for the plaintiff.

H. H. Barbour and H. P. Thornton, for the defendant.

LYNN v. JETER.

WITNESS.—A, an indorsee of a sealed note for the payment of \$1,000, indorsed it in blank to B, who, without indorsing the note, delivered it to C, and the latter sold it to D without indorsing it. D sued A as an indorser, an indorsement in full to the plaintiff being written over the defendant's name. Held, that, supposing the plaintiff could only recover the amount the defend-

(a) *Dequandre v. Williams*, 31 Ind., 444.

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ant had received from *B* for the note, (of which, however, no opinion was given,) still a statement made by *B* whilst he held the note, that he had paid for it only \$650, could not be proved by the defendant; *B* himself being a competent witness in the cause.(a)

ERROR to the *Franklin* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Jeter* against *Lynn* on the assignment of a sealed note. The note was for \$1,000, and payable five years after date. Plea, the general issue. The cause was submitted to the Court, and judgment rendered in favour of the plaintiff for \$1,072 and costs.

It appears that the note was made by one *Lowe* to *Jesse York*, indorsed by the latter to one *Shoup*, and by *Shoup* to the defendant, the indorsements being in full; that, afterwards, the defendant indorsed the note in blank, and delivered it to one *Barwick*; that the latter, without indorsing it, delivered it to one *Brown*; and that *Brown*, without indorsing it, sold and delivered it to the plaintiff. It further appears that, at the trial, an indorsement in full to the plaintiff was written by him on the note over the defendant's name; that the maker of the note was, at the time it became due, and afterwards, [*301] notoriously insolvent. After proof of the *above facts, the defendant offered to prove that *Barwick*, whilst he was the *bona fide* holder of the note under said blank indorsement, had said that he had given only \$650 for the note; which evidence was objected to and the objection sustained.

Supposing the plaintiff could only recover in this suit the amount which the defendant received from *Barwick* for the note, of which, however, we give no opinion, still the evidence was inadmissible. It was objectionable on the ground that it was not the best evidence on the subject. *Barwick* himself was a competent witness, and should have been sworn. He could have no interest in reducing the amount to be recovered by the plaintiff against the defendant. His interest, if he had any, was the other way.

(a) *Bowers v. Headen*, 4 Ind., 318.

The Board of Commissioners of Johnson County v. Mullikin and Another.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman and *P. L. Spooner*, for the plaintiff.

G. Holland, for defendant.

THE BOARD OF COMMISSIONERS OF JOHNSON COUNTY v. MULLIKIN and Another.

VOID CONTRACT.—A promissory note given to the county commissioners, in consideration of their appointment of a certain person to the office of collector of the revenue is void.

ERROR to the *Johnson Circuit Court*.

SULLIVAN, J.—Assumpsit by the plaintiffs against the defendants on a promissory note in the following words: "*Franklin, May 8th, 1840. On or before the first day of May next, we or either of us will pay to James Gillaspie, Daniel Covert, and James Ritchie, commissioners of Johnson county, or their successors in office, the sum of \$131 31, for value received in the appointment of collector of the State and county revenue of Johnson county for the year 1840, which sum when paid to the board, is to go to the county treasurer's office, to be a part of the county revenue of said county of Johnson. Arthur Mullikin. David Allen.*" General demurrer to the declaration. Demurrer sustained and judgment for the defendants.

[*302] *The objection to the plaintiff's right to recover is, that the note was given in consideration of the sale of a public office, and therefore void.

It is admitted by the parties, as well as apparent from the note itself, that it was given in consideration of the appointment of one of the promisers, or of some other person, to the office of collector of the State and county revenue of *Johnson county* for the year 1840, and the question is, whether a promise to pay money on such a consideration is valid or not. The office of collector of the revenue is one of great responsibility, and

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the public is deeply interested in the fidelity with which its duties are discharged. The public interest requires that it should be filled by men selected with especial reference to their competency to fill the office, and not with reference to their ability to purchase it. By the common law, the sale of offices of a public nature is forbidden, as having a tendency to tempt officers to abuse their power by bribery, extortion, and other acts of injustice, by which they may be reimbursed for the expense they incurred in getting their places. 5 Bac. Abr. tit. Offices and Officers, F. It does not matter whether the office be sold in violation of an express statute or not. If the bestowment of it be for a money consideration, it is in contravention of public policy, and equally void. *Bluchford v. Preston*, 8 T. R., 89; *Garforth v. Fearon*, 1 H. Blackstone, 327; *Card v. Hope*, 2 Barn. & Cress., 661.

Per Curiam.—The judgment is affirmed with costs.

F. M. Finch, for the plaintiffs.

W. Quarles and *J. H. Bradley*, for defendants.

ROGERS v. PERDUE.

JURISDICTION OF JUSTICE OF THE PEACE.—To a suit on a promissory note commenced before a justice of the peace, a plea that the note was given in consideration that the payee would convey certain land to the defendant, that the payee had no title to the land, and that he had failed to make the deed, does not oust the justice of jurisdiction.(a)

[*303] *ERROR to the *Clark* Circuit Court.

DEWEY, J.—This was an action commenced before a justice of the peace, by the assignee against the maker of a promissory note. The note executed by the defendant, and bearing on its back the assignment of the payee to the plaintiff, reads as follows: "Two months after date, I promise to pay *Zachariah Johnson* \$20.00, it being in full for 350 bushels

(a) *Barber v. Barber*, 21 Ind., 468; 18 Id., 126; 12 Id., 481; 10 Id., 237; 7 Id., 46

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of corn. *March 21, 1842.*" Among other pleas filed before the justice, the defendant pleaded that the note was given "in consideration that the plaintiff's assignor should and would, on or before the 1st day of *June, 1842*, make and execute to the defendant a good and sufficient deed in fee simple," for a certain lot of land. The plea then averred want of title in the assignor, and his failure to make the deed. The justice heard the cause, and rendered judgment in favour of the plaintiff. The defendant appealed, and moved the Circuit Court to dismiss the action, for want of jurisdiction in the justice. The motion was overruled, and the Circuit Court, after hearing the evidence, gave judgment for the plaintiff.

It is contended by the plaintiff in error that the plea above stated put in issue, before the justice, title to real estate, and, therefore, destroyed his jurisdiction.

This objection is founded on the statute, which provides that whenever, in the progress of any cause before a justice of the peace, title to real estate shall be put in issue by the pleading, or shall appear, by the proof, to be necessarily involved, he shall proceed no further with the trial, but shall certify the cause to the Circuit Court. *Laws of 1839, p. 36.* We do not think the plea did, of itself, put the title to land in issue. There was no replication; nor was any required by the practice before justices of the peace. The plea admitted of two answers: first, a denial that the consideration of the note was such as the plea alleged: and, secondly, that the assignor had title to the lot named in the plea, and executed a deed according to his undertaking. The second issue would have taken away the jurisdiction of the justice; but the first would not: it would not have involved the title to real estate. We think, therefore,

that the justice of the peace and the Circuit Court [*304] were correct in retaining jurisdiction, unless it appeared from the evidence that the title to land was brought in question. As the record is silent on that subject, we must presume there was no such evidence; and this presumption is strengthened by a reference to the face of the note, which expresses the consideration of the defendant's promise to

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have been corn, and not land, purchased by him of the assignor. Indeed, there is no little reason to believe that the plea was a sham.

Per Curiam.—The judgment is affirmed with costs.

H. P. Thornton, for the plaintiff.

J. G. Marshall, for the defendant.

MCDORMAN v. JELLISON.

PLEADING—VARIANCE.—Debt on a promissory note. Plea, that the consideration of the note was the plaintiff's undertaking, by bond, to convey to the defendant a certain tract of land, but that the plaintiff never had any title to the land. The plaintiff having obtained *oyer* of the bond, replied to the plea. *Held*, on demurrer to the replication, that the plea was bad, the bond shown on *oyer* being materially different from that which the plea had previously described.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *McDorman* against *Jellison* on a promissory note for the sum of \$500, payable nine months after date.

The defendant pleaded as follows: That the note was procured to be made through the fraud, covin and deceit of the plaintiff, without any good or valuable consideration whatever, in this, to wit, that the plaintiff fraudulently pretended to be the owner, in fee-simple, of the west half of the southeast quarter of section two, in township twenty-four, range seven east, of lands sold at *Fort Wayne*, and then and there, in consideration that the defendant would execute to him the note in the declaration specified, he, the plaintiff undertook and promised, by his bond, dated the 21st of *February*, 1839, and now here shown to the Court, to convey to the defendant and his heirs, in fee-simple, the above described premises; and the defendant avers that, upon the promises in the bond aforesaid of the plaintiff, and for no other consideration what-
 [*305] ever, *he did execute and deliver to the plaintiff the note in the declaration specified; and he further avers

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that the plaintiff had not then, nor has he now, any right or interest whatever in the premises, and that he had not then, nor has he now, any power whatever to sell or convey the same to the defendant. And this he is ready to verify.

The plaintiff craved *oyer* of the bond mentioned in the plea, and it was read to him as follows: Know all men by these presents that I, *James McDorman*, am held and firmly bound unto *H. D. Jellison* in the sum of \$1,200, &c., for the payment whereof, &c. "The condition of the above obligation is such, that if the above bound *James McDorman* or his heirs, on or before the first day of *April*, 1844, or so soon as five notes of hand shall be paid in full, given by said *Jellison* to said *McDorman*, shall, upon the reasonable request of the said *Jellison*, his heirs or assigns, and at his or their proper costs and charges, make, execute, and acknowledge, a deed or deeds of conveyance, such as will be sufficient to convey, assure, and confirm, to the said *Jellison*, his heirs and assigns, a good, absolute, and indefeasible estate of inheritance in fee-simple, clear of all incumbrances, of and in the following messuage and tenement, to wit, the west half of the southeast quarter of section two in township 24, range 7 east, of the lands sold at *Fort Wayne*, with the appurtenances thereunto belonging, and in the mean time and until such deed shall be executed, shall and do permit said *Jellison*, his heirs and assigns, peaceably and quietly to hold and enjoy the said messuage and tract of land, then the above obligation to be void, otherwise in force." And thereupon for replication to said plea, the plaintiff says *precludi non*, because he says that the note in the declaration mentioned was not obtained by the plaintiff from the defendant, through fraud, misrepresentation, and deceit, as in said plea is alleged; and this he prays may be inquired of by the country.

A general demurrer was filed to the replication, and the demurrer sustained. Final judgment for the defendant.

It is not necessary to examine the replication, as we consider the plea to be substantially defective. The title-bond, in consequence of the *oyer*, became a part of the plea, and it

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[*306] *should appear to be the same bond with that which the plea had before described. The bond first stated in the plea, is, for a conveyance of the land to the defendant in fee, without naming any time when, or condition on which, the conveyance should be made. The bond of which *oyer* was given, is for the payment of a certain sum of money, conditioned for a conveyance in fee of the land to the defendant on or before the first of *April*, 1844, or so soon as five notes of nand should be paid in full, given by the defendant to the plaintiff, on the reasonable request of the defendant, and at his costs and charges. These two obligations are obviously and meterially different from each other, and the variance renders the plea, in substance, defective. The plaintiff, on a demurrer to the replication, has a right to show the plea to be bad on general demurrer.

The plea being insufficient, the judgment for the defendant can not be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test, for the plaintiff.

J. Rariden, for the defendant.

PURCELL v. THOMAS and Another.

DISTRESS FOR RENT.—A tenant contracted to pay annually, for the rent of certain real estate, \$96.00 in *Indiana* scrip. *Held*, that the remedy by distress does not lie on such contract.(a)

APPEAL from the *Knox* Circuit Court.

SULLIVAN, J.—Replevin. An agreed case was made by the parties, containing, substantially, the following facts: The property named in the declaration had been distrained by the defendants for rent due on a lease of certain lots in *Vincennes*,

(a) *Browner v. Scott*, 8 Blackf., 86.

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by virtue of which the tenant bound himself to pay annually, for the rent of said lots, \$96.00 in *Indiana* scrip. The only question in the Circuit Court was, and the only question we have to consider now is, whether the remedy by distress will lie on such a contract. The *Circuit Court decided that it would, and gave judgment for the defendants.

To authorize a distress, the sum distrained for must be certain, or capable of being reduced to a certainty. If the rent reserved be \$100 payable in corn, or in repairs, the amount is certain though it be not in money. In such case, it is well settled, the landlord may distrain. On the other hand, where the value of the rent is uncertain, as where the rent reserved is one-third of the corn raised, the remedy by distress does not lie. *Clark v. Fraley*, 3 Blackf., 264. By repeated decisions of this Court, contract to pay a specified sum in bank bills is a contract to pay the worth of those bills, and in an action on such contract their value only can be recovered. It is a promise to pay in property, the value of which is fluctuating and uncertain. *Wilson v. Hickson*, 1 Blackf., 230; *Harper v. Levy*, Id., 294; *Coldren v. Miller*, Id., 296; *Hedges v. Gray*, Id., 216. If bank bills be, in the view of the law, of certain value, State scrip, in all its varieties, can not be viewed in any other light. It follows, therefore, according to the case of *Clark v. Fraley*, *supra*, that a distress will not lie on this contract. The landlord must be left to his remedy as in other cases of contract.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the appellant.

B. M. Thomas, for the appellees

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GRAND JURORS.—A plea in abatement to an indictment, that the grand jurors who found the indictment, were selected by the board of commissioners on

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the 6th of *May*, 1841, and that they had no authority to make the selection on that day, is bad for not showing, that said 6th of *May* was not included in the *May* session of the board in that year.^(a)

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—This was a prosecution against a licensed grocery keeper for selling spirituous liquor to an intoxicated person. The indictment was found at the *September* [*308] term, *1841, of the *Fountain* Circuit Court. The defendant pleaded in abatement, that the grand jurors, who found the indictment, were selected by the board of commissioners of *Fountain* county on the 6th day of *May*, 1841; and that they were not authorized by law to make such selection, or do any other county business, on that day. Demurrer to the plea overruled, and the indictment quashed.

By the law in force when the grand jurors in question were selected, the board doing county business in each county, was required to select grand and petit jurors at the *May* session, which was to be held on the first *Monday* of that month, and might continue for five days. R. S., 1838, pp. 358, 151. No statute, exempting the county of *Fountain* from the operation of this general provision, has been pointed out to us; and we know of none. The plea does not show that the 6th of *May*, the day on which the grand jurors were selected, was not included in the *May* term of the board of commissioners, and is, therefore, bad. The general allegation, that the commissioners had no authority to make the selection on that day, is too vague for a plea in abatement. The board was authorized to select the grand jurors at the *May* session, which might, for aught that appears, have embraced the day on which the selection was made. The demurrer should have been sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Willson, for the State.

(a) *Hardin v. The State*, 22 Ind., 347.

Carpenter and Another v. Shanklin.

CARPENTER and Another v. SHANKLIN.

LANDLORD AND TENANT.—By a lease of real estate executed by the lessor and lessee under their seals for one year, the time fixed for the payment of the last half year's rent was *the first of February, 1841*. Held, that parol evidence that the said rent was not due until the first of *March, 1841*, was inadmissible. Held, also, that the landlord, in such case, had a preference for said rent over an execution levied on *the first of February, 1841*, on the tenant's goods.

[*309] *ERROR to the *Vanderburgh* Circuit Court.

BLACKFORD, J.—The record in this case shows, that *Shanklin* had demised to one *Dawley*, by a lease under seal, certain real estate for one year, ending on the 23d of *February, 1841*, for which the lessee was, by the said lease, executed also by him under his seal, to pay \$125 rent, one-half on the first of *August, 1840*, and the other half *on the first of February, 1841*; that a constable, by virtue of an execution in favour of *Alvin and Willard Carpenter* against *Dawley*, levied upon the latter's goods *on the first of February, 1841*, and afterwards sold the same for \$75.00. It further appears that *Shanklin*, claiming a half year's rent to be due him on the first of *February, 1841*, from *Dawley*, under said lease, proceeded directly after that time, before a justice of the peace, pursuant to the statute of 1838, and, by the judgment of the justice, established his claim to the rent, viz., \$62.50, as due on the first of *February, 1841*. From that decision of the justice the execution-creditors appealed to the Circuit Court.

On the trial of the cause in that Court, *Shanklin*, the plaintiff, gave in evidence the lease to *Dawley*, which we have already noticed, and also a promissory note as follows, viz., “\$62.50. On the first day of *March, 1841*, I promise to pay *John Shanklin*, or order, \$62.50, for half year's rent, ending on the date above-mentioned. Dec. 24, 1840. *M. A. Dawley*.” The execution-creditors, *Alvin and Willard Carpenter*, proved by *Dawley* that said note was given for the last half year's rent reserved in said lease; that the witness supposed when he gave

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the note that said rent was not payable, by the terms of the lease, till said first of *March*. They also proved that an account, in the plaintiff's handwriting, was presented by his clerk to *Dawley*, in which there was a charge for said half year's rent due the first of *March*, 1841. This is the substance of the evidence contained in the record; but how much other evidence was given, we are not informed.

The record shows the agreement of the parties to be that the only matter of dispute between them is whether the rent for the last half year was due at the time of the levying of the aforesaid execution.

[*310] *The Circuit Court gave judgment for the plaintiff for \$66.22.

In determining the question submitted by the parties as above-mentioned, we are first to inquire whether it was on the first of *February* or the first of *March*, 1841, that the last half year's rent was payable. We think the lease, which is under the seal of the parties, must govern as to this matter; and according to that the said rent was payable on the first of *February*. The evidence relied on to show that the first of *March* was the time is parol, and can not be admitted to control the lease. The next subject to be noticed is whether the rent, which was payable on the said first of *February*, can be considered to be due on that day so as to give a preference to the plaintiff as landlord, under the statute of 1838, over an execution levied on the same day on the tenant's goods. It is decided in *Ladbrook v. Wilmot*, cited in *Tidd's Prac.*, 1054, 8th ed., and in *Sewell's Law of Sheriff*, 256, that the rent which became due on the day the execution was levied, may be claimed by the landlord. That case was decided under an *English* statute, viz., the statute of *Anne*, the language of which, so far as the present question is concerned, is the same with ours (R. S., 1838, p. 473, sect. 5); and we think the decision is unobjectionable.

Per Curiam.—The judgment is affirmed with costs.

J. Law and *L. Barbour*, for the plaintiffs.

J. Pitcher and *O. H. Smith*, for the defendant.

Usher v. Stewart.

USHER v. STEWART.

PLEADING—PRACTICE.—Assumpsit for goods sold and delivered, &c. Plea of payment, alleging that the plaintiff was indebted to the defendant in a certain sum for money had and received, &c. Replication in denial of the plea. *Held*, that a promissory note given by the plaintiff to a third person, and indorsed to the defendant before the suit was commenced, might be read in evidence by the defendant under the plea.

ERROR to the *Vigo* Circuit Court.

SULLIVAN, J.—Assumpsit by *Stewart* against *Usher* for board, washing and lodging, and goods sold and [*311] delivered. *Pleas, 1. Non assumpsit, 2. The statutory plea of payment, setting forth that the plaintiff was indebted to the defendant in the sum of \$100, for so much money before then had and received by the plaintiff for the defendant's use, &c. *Similiter* to the first plea, and replication in denial of the second. Verdict and judgment for the plaintiff.

On the trial, the defendant proved the execution of a promissory note, given by the plaintiff to *B. Booth* for the sum of \$32.92, due *January 5th*, 1842, and the indorsement of it to himself before suit brought, and offered to read the note in evidence to the jury in support of his second plea; but the Court, on motion of the plaintiff, rejected the evidence. This is the only error complained of.

We have heretofore decided, that an action for money had and received may be maintained by the indorsee against the maker of a promissory note, and that in such action the note and indorsement are evidence to support the suit. *Indianapolis Ins. Co. v. Brown et al.*, 6 Blackf., 378. The same rule of evidence applies, where money had and received by the plaintiff to the use of the defendant is made the foundation of a defense. The statute, which authorizes this mode of pleading, requires the contract, on which the defendant relies, to be set out in his plea; hence, it is argued by the defendant in error, that the general mode of pleading adopted in this case

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is not embraced by the statute. But in this conclusion he is evidently mistaken. There is a difference between the contract, and the evidence by which it may be proved. A plaintiff in his declaration must set out the contract on which he relies with legal certainty, and he must prove it as stated. If the plaintiff in error had brought an action for money had and received against the maker of the note offered in evidence, and if he could have supported it by the note and the indorsement, it is difficult to perceive why the same evidence will not support the identical contract when set up as a matter of defense. The plaintiff need not be taken by surprise by this general mode of pleading, because he may, before replying, demand a bill of particulars.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. D. Griswold, for the plaintiff.

R. W. Thompson and *C. W. Barbour*, for the defendant.

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*CULLY v. Ross, Assignee.

WITNESS—A bankrupt is not a competent witness, in trover by his assignee, to prove property in the latter, unless he release to the plaintiff all claim to an allowance out of his estate, as well as to the surplus.

ERROR to the *Union Circuit Court*. Verdict and judgment in the Circuit Court for *Ross*, the plaintiff.

DEWEY, J.—This was an action of trover by the assignee of a bankrupt. Plea, not guilty; and also a plea that the plaintiff was not assignee. The plaintiff, to prove property in himself as assignee, produced the bankrupt as a witness, who had received his final discharge and certificate; and who had released to the assignee all claim to a surplus of his estate, but not to his allowance. The witness was objected to on the score of interest; but the objection was overruled, and he was sworn.

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We think this decision was wrong. To render the bankrupt competent as a witness to prove property in his assignee, he should have released all claim to an allowance out of his estate, as well as to the surplus. *Schneider v. Parr*, Peake's Add. Cas., 66; 2 Phill. Ev., 354; *Ewens v. Gold*, Bull. N. P., 43. A bankrupt, in *England*, is allowed a certain percentage on the net proceeds of his estate, provided the creditors are paid 10s. in the pound, or more; but if they receive less than that rate, the allowance depends upon the discretion of the assignees and commissioners. 1 Harr. Dig., 419. By the 3d section of the bankrupt act, passed by Congress in 1841, the assignee was bound to allow the bankrupt his necessary household and kitchen furniture, and such other articles and necessities as the assignee should designate, having reference in the amount to the family, condition and circumstances of the bankrupt, not exceeding \$300 in value, besides wearing apparel. In considering the condition and circumstances of the bankrupt, it was proper for the assignee to take into view the amount of his property compared with his debts, and to estimate the allowance accordingly. It is evident, therefore, that the bankrupt had a direct interest to increase the [*313] assets in the hands of the assignee, *unless he had previously received his allowance in full. If such was the fact, the record should have shown it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid, for the plaintiff.

J. B. Sleeth, for the defendant.

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FORFEITED RECOGNIZANCE.—In the case of a forfeited recognizance, an execution can not be awarded against a recognizor, on whom a *scire facias* has not been served, and who has not appeared, until there have been two returns of *not found* to writs of *scire facias* against him, directed to the sheriff of the county in which the recognizance was taken.

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ERROR to the *Wabash* Circuit Court.

BLACKFORD, J.—*Minor Graham* and three other persons entered into a joint recognizance at the *March* term, 1841, of the *Wabash* Circuit Court, in the sum of \$2,000. The recognizance was conditioned that one *John Graham* should be and appear from day to day of said term, and answer the State on an indictment against him for forgery. At a subsequent day of the term, the said *John Graham* and his said sureties were called and made default, the recognizance of the sureties was declared forfeited, and a *scire facias* ordered to be issued. In *July*, 1841, a *scire facias* in the cause was issued by the clerk, directed to the sheriff of *LaPorte* county, requiring the said sureties to show cause why execution should not issue, &c. This writ was returned to the next term served on two of the defendants, and “not found” as to the two others. In *February*, 1842, another *scire facias* issued, which was directed to the sheriff of *Wabash* county, requiring said sureties to show cause, &c., and which was returned “not found” as to all the defendants. At the *March* term, 1842, the said sureties were called and made default, and an execution was ordered to be issued against them.

This judgment ordering execution is erroneous. Before an execution can be awarded against a recognizer upon [*314] *whom a *scire facias* has not been served, and who has not appeared, there must be two returns of “not found” to writs of *scire facias* against him, directed to the sheriff of the county in which the recognizance was taken. The State has not proceeded according to this rule, in the case before us, as to two of the defendants.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. H. Bradley, for the plaintiffs.

A. A. Hammond, *C. Fletcher*, and *O. Butler*, for the State.

Ham v. The State, on the Relation of Williams, &c.

HAM v. THE STATE, on the Relation of WILLIAMS.
 ROYSTON v. THE STATE, on the Relation of DUNBAR.
 THE STATE, on the Relation of HEROD, v. RUDDICK.

COUNTY TREASURER, TERM OF OFFICE.—A county treasurer holds his office for three years from the time of his election, and until his successor is elected and qualified.

CONSTRUCTION OF STATUTES.—If two statutes be inconsistent with each other, the last one must govern.(a)

OFFICIAL BONDS.—Under the statute of 1843, requiring the county treasurer to give bond on or before the 12th of August, &c., the county commissioners may approve of the bond before or at their first session thereafter.

ERROR. The first-named case was from the *Wayne* Circuit Court; the second, from the *Vanderburgh* Circuit Court; and the third from the *Bartholomew* Circuit Court.

SULLIVAN, J.—Informations were filed in each of the foregoing cases in the nature of writs of *quo warranto*, alleging that the defendants unlawfully held and exercised in their respective counties, the office of county treasurer; that the relators were entitled to the office; and praying the judgment of the Court, &c.

The facts stated in each of the records before us are substantially the same, and are as follows, viz.: The defendants were elected treasurers of their respective counties on the first *Monday* of *August*, 1841, were duly qualified, and entered upon the duties of their office. On the first *Monday* of *August*, 1844, the relators were elected their successors, and, having given bond, and taken the oath prescribed by the statute, insist that they are, in fact and in law, the treasurers [*315] *of their respective counties. The defendants resist the claim, alleging that they are, by law, entitled to hold until the first *Monday* of *March* next. In the cases of *Ham v. The State*, &c., and *Royston v. The State*, &c., the Circuit Courts decided in favour of the relators. In the case

(a)*Spencer v. The State*, 5 Ind., 41; *Id.*, 479; 2 *Id.*, 440.

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of *The State, &c.*, v. *Ruddick*, the judgment of the Circuit Court was in favour of the defendant.

The relators and the defendants found their claims to the offices on positive statutory enactments, which are plainly inconsistent with each other. By the 18th sect., 2d art., 4th chap., of the revised statutes, p. 98, it is enacted, "that the county treasurer for each county shall hold his office for the term of three years from and after *the first Monday of March next succeeding his election*, and until his successor is elected and qualified." By the 70th sect., 4th art., 7th chap., of the same revision, p. 192, it is provided, that "the county treasurer shall hold his office for the term of three years *from the time of his election*, and until his successor is chosen and qualified." It therefore devolves upon this Court to ascertain the will of the Legislature, and determine which of the foregoing statutes regulates the tenure of the treasurer's office.

In 1841, when the defendants were elected, the tenure of their office, as regulated by the law then in force, was for three years, and until their successors were elected and qualified. The two statutes above referred to were enacted in 1843, and at the same session of the General Assembly. The effect of the first recited statute was to extend the term of office about seven months beyond the time for which the incumbent was elected: the object of the second statute was to restore it, or limit it, to the period prescribed by the act of 1841. The statutes being inconsistent, they can not stand together; and, in determining which is the law of the land, we know of no other rule of construction than that the last expressed will of the Legislature must prevail. Adopting this rule then as our guide, our opinion is that the will of the Legislature, as last expressed on this subject, is contained in the 70th sect., 4th art., 7th chap., above referred to, and that the term for which the defendants were elected, ceased so soon as the relators were qualified to enter on their offices respectively.

[*316] *It is urged as an objection to this view of the law, that it conflicts with other provisions of the statute, as, for example, that the treasurer elect shall enter into bond

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on or before the 12th day of *August* next after his election, and that his bond shall be approved by the county commissioners. The defendants say that the last-named requisitions of the statute can not be complied with, because the treasurer elect can not receive a certificate of his election by the day named; nor is there any law authorizing the commissioners to meet on that day to approve the bond.

We perceive the difficulty suggested by the defendants, but we do not perceive how it affects the construction we have given to the law. On either construction, the same difficulty exists. Whether the treasurer holds his office for three years *from and after the first Monday of March* next after his election, or for three years *from the time of his election*; the mode and manner of qualification are the same. It is not necessary, therefore, to support the construction we have given to the statutes, by reconciling those requisitions with it. It may be proper however to say, that when the language of a statute is ambiguous, or the words repugnant, the Court will seek to find out the intention of the Legislature, and to give it effect. No statute shall be interpreted, say the authorities, so as to be inconvenient and against reason. We feel authorized to conclude, therefore, that the law requiring the treasurer to enter into a bond, on or before the 12th day of *August*, to be approved by the county commissioners, confers a power on the commissioners to hold a meeting for that purpose if they shall think proper to do so; and if not, that an acceptance of the bond at their first meeting thereafter would be a compliance with the spirit of the law.

Per Curiam.—The judgments in the first two cases are affirmed with costs. The judgment in the last is reversed with costs, and the cause remanded, &c.

C. H. Test, for the plaintiff, and *J. S. Newman* and *J. Perry*, for the defendant, in the first case.

J. Lockhart, for the plaintiff, and *J. Pitcher*, and *C. Baker*, for the defendant, in the second case.

A. A. Hammond, for the plaintiff, and *H. Brown*, for the defendant, in the last case.

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*DEAN v. SPEAKMAN.

LOST NOTE.—If a promissory note sued on be torn and a part of it lost, a copy of the entire note sworn to is admissible evidence.

SAME.—An action at law lies on an unnegotiated promissory note, which has been lost or destroyed.

BANKRUPTCY.—A joint debtor with a bankrupt has a contingent claim on the latter, which is provable under the commission of bankruptcy; and the bankrupt's certificate will bar a suit against him for contribution.

WITNESS.—To render a certified bankrupt a competent witness for his co-debtor, in an action for the joint debt, the bankrupt must release to his assignee all claim to surplus and allowance.(a)

APPEAL from the *Dearborn* Circuit Court.

DEWEY, J.—Debt on a promissory note by *Speakman*, the payee, against *Cochran, Folbre, Dean, F. Baldwin, and H. Baldwin*, the makers. The process was returned "not found" as to the *Baldwins*, and the return suggested on the record. *Dean* pleaded the general issue. *Cochran* and *Folbre* pleaded, separately, bankruptcy. Replications to their pleas that each of them, after his discharge and certificate, affirmed and ratified the note, and promised to pay it. Rejoinder in denial, and issue. The jury found against *Dean*, and in favour of *Cochran* and *Folbre*. Judgments accordingly.

On the trial, the plaintiff offered in evidence a paper bearing the signatures of all the original defendants, which appeared to be a considerable fragment of a promissory note; and offered to prove by his attorney that the paper was part of a promissory note which had been placed entire in his hands by the plaintiff, but which had been mutilated by having a small piece torn off one end; this, the witness supposed, had been occasioned by the frequent withdrawal and replacement of the note among the files where it was usually kept. The witness produced and swore to a copy of the entire note made before the latter was torn, which copy corresponded with the note described in the declaration. The witness stated that he had made dili-

 (a) *The Madison, &c., Co. v. Mitchell*, 1 Ind., 384.

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gent search for the missing piece of the note, but could not find it. This evidence was all objected to, but admitted by the Court.

Dean produced as a witness *F. Baldwin*, one of the original defendants, on whom the process was not served, and offered to prove that he was a certified bankrupt; and that [*318] *he, *Dean*, had released him from all claim to contribution, should *Dean* be compelled to pay the money due by the note. The witness was excluded.

The admission of the plaintiff's testimony to establish the note was right. The absence of the torn off part was sufficiently accounted for to let in secondary evidence of its contents; and the sworn copy of the entire note was legal evidence for that purpose.

No objection to the plaintiff's sustaining the action, on the ground of its being founded on a lost note (even had it been lost), could prevail. The action was between the payee and the makers; and the possession of the note by the plaintiff at the time a part of it was torn off and lost, raises a fair presumption that it had not been negotiated; in which case an action at law was proper. Chitt. on Bills, 155. But the case bears a stronger analogy to that of a destroyed note than to a lost one; and on a destroyed note an action at law will lie. Chitt. on Bills, 155. We think the Court was also correct in excluding the witness offered by the defendant. Whether he was objectionable, as being a party to the record, if he was one, we shall not consider, because we view him as incompetent on the score of interest. The fifth section of the bankrupt act, passed by Congress in 1841, allows "sureties, indorsers, bail, or other persons having uncertain or contingent demands" against the bankrupt, to prove their claims under the commission of bankruptcy. And the fourth section provides that all claims provable under the act shall be barred by the discharge and certificate of the bankrupt. Now, every joint debtor has a demand against his co-debtor, contingent upon his being compelled to pay more than his share of the debt. Such a demand was *Dean's* against each of the other makers of the note sued on in this cause;

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and we think it was provable under the commission against *F. Baldwin* to the amount of his share of the note, and that being so provable, all demand for contribution against *Baldwin* was barred by his discharge and certificate. Besides, *Dean* may well be considered as the surety of *Baldwin* to the extent of the latter's share of the debt paid by him; and this view would entitle him to prove his claim under the act of Congress, and, of course, bar him from *demanding contribution of *Baldwin*. It follows from these principles, that *Dean's* release of contribution to *Baldwin* was inoperative; he had no such demand against him; his remedy was in proving his claim under the commission. The release did not reach the real interest of *Baldwin*, which consisted in this: He was entitled to the surplus of his estate, (if any), after paying his debts; and he was entitled to an allowance, depending in some measure upon the discretion of his assignee, to be regulated by the condition and circumstances of his estate. Sect. 3d of the bankrupt act. Now as *Dean* had a right to claim, under the commission against *Baldwin*, to the amount of *Baldwin's* share of the joint debt paid by *Dean*, that claim would take a part of the assets in the hands of the assignee, and consequently lessen, in proportion, the claim of the bankrupt to surplus and allowance. To have rendered *Baldwin* competent as a witness, he should have released to his assignee his claim to surplus and allowance. The foregoing views are sustained by the following cases. *Aflalo v. Fourdrinier*, 6 Bing., 306; *Wood et al. v. Dodgson*, 2 M. & S., 195; *Perryman v. Steggall et al.*, 8 Bing., 369.

Per Curiam.—The judgment is affirmed with costs.

J. T. Brown, *E. Dumont*, and *T. Gazley*, for the appellant.

J. Ryman and *P. L. Spooner*, for the appellee.

GRIMES v. NEWELL.

INDORSEMENT OF NOTE—PLEADING.—*G.* as assignee sued *N.* as assignor of a promissory note payable to *N.*, and negotiable and payable at a branch of
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the State Bank. The declaration showed, *inter alia*, that the maker of the note had refused to pay, and that the plaintiff knew of his default. Plea, that *G.* indorsed his name on the note, at the instance of the maker, for the purpose of guaranteeing its payment to *N.*, and that the maker afterwards delivered to *N.* the note so indorsed; and that *N.* afterwards sold the note to one *S.*, and indorsed his, *N.*'s, name on it, for the purpose of transferring it to *S.* Replication that the indorsement of the note by the defendant was made before the plaintiff indorsed the note. *Held*, that the plea and replication were both good.

[*320] *ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit, brought by the assignee against the assignor of a promissory note, negotiable and payable at a branch of the State Bank. The declaration contained two special counts. The first, after alleging the making of the note to the defendant, and his indorsement of it to the plaintiff, states that the plaintiff indorsed the note to one *Dugan*, and that the latter indorsed it to one *Stockton*. It also states that *Stockton* duly presented the note for payment, that payment was refused, and that due notice of the non-payment was given to the parties concerned. The second count, after alleging the execution of the note, and its indorsement by the defendant, as mentioned in the first count, avers the due presentment of the note for payment, its non-payment, and due notice of its dishonour.

There are three pleas: 1, Non assumpsit; 2, No consideration for the assignment. The third plea, after some immaterial matter, alleges that the plaintiff and one *Dugan*, at the instance of the makers of the note, indorsed their names on it for the purpose of guaranteeing and securing to the defendant the payment of the note; that, afterwards, the makers delivered the note so indorsed to the defendant; and that the defendant, afterwards, sold the note to one *Stockton*, and indorsed his, the defendant's, name on it, for the purpose of transferring it to *Stockton*, and for no other purpose.

To the second plea, the plaintiff replied that the indorsement was made on a good consideration. The third plea was replied to as follows: That the indorsement averred in the declaration to have been made by the defendant, was made by

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him before the plaintiff indorsed the note, the defendant's name being on the note as indorser at the time of the plaintiff's indorsement; and that the indorsements in the plea mentioned were not made under the circumstances, for the purposes, and in the manner and form alleged in the plea.

General demurrer to the replication to the third plea, and judgment for the defendant.

It appears by the declaration, that the makers of the note had refused to pay it, and that the plaintiff knew of their default; and the third plea shows, that, under those circumstances, the plaintiff as guarantor, is liable to the [*321] defendant *for the same amount that the defendant, if bound as assignor, is liable for to the plaintiff. That is a sufficient reason why the action should not be sustained. *Bishop v. Hayward*, 4 T. R., 470: *Britten et al. v. Webb*, 2 Barn. & Cress., 483. And to this plea, the replication demurred to is a good answer. It avers, that the defendant's indorsement was made before the plaintiff's, the defendant's name being on the note as indorser at the time the plaintiff indorsed it. There was, therefore, in substance, a good issue formed by the pleadings in question, viz., whether the plaintiff had or had not indorsed his name on the note, as a guarantor, before the defendant received it. And the demurrer to the replication should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, for the plaintiff.

R. Jones, D. Mace, and W. M. Jenners, for the defendant.

WALLACE and Wife v. JONES, in Error.

IN assumpsit against husband and wife on a promissory note made by the wife *dum sola*, and non assumpsit pleaded, the plaintiff must prove the marriage. *Cowley v. Robertson et ux.*, 3 Camp., 438.

PICKENS v. CLAYTON, on Appeal.

THE Probate Court can not remove a guardian, except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given by him. R. S., 1838, pp. 195 196; *Morgan v. Anderson et ux.*, 5 Blackf., 503. (See 13 Ind. 159.)

[*322] *THE STATE v. ROSS, in Error.

AN indictment for gaming need not state the name of the game played. *The State v. Maxwell* 5 Blackf., 230.

PAGE v. PRENTICE and Another.

PLEADING.—A plea which confesses the cause of action, and avoids it by some new matter, does not amount to the general issue.

SAME—PRACTICE.—In debt on a promissory note, accord and satisfaction, and payment, may be pleaded specially, or may be given in evidence under the general issue.

ERROR to the *Jefferson* Circuit Court.

SULLIVAN, J.—Debt on a promissory note by defendants in error, as the assignees of one *Stivers*, against *Page*. The defendant below pleaded, 1, That after the making of the said promissory note, and before the same fell due, and before the assignment thereof to the plaintiffs, to wit, on the 19th of *October*, 1839, the defendant, at the special instance and request of said *Stivers*, made his certain promissory note for the sum of \$2,190.66, parcel of the debt sued for, payable one year after date to the order of said *Stivers*, for value received; and that he the defendant, on the same day, also drew a bill of

exchange directed to one *S. K. Page* of *Louisville, Ky.*, for the further sum of \$2,309.36, being the residue of the debt sued for, payable to said *Stivers* or order, and then and there delivered the said note and the said bill of exchange to the said *Stivers*, and the same were received by him in full satisfaction and discharge of the note declared on; that the bill of exchange was accepted by the said *S. K. Page*, and paid according to its tenor, and that the promissory note for the sum of \$2,190.66, given by the defendant to *Stivers* as aforesaid, was forthwith assigned by said *Stivers* to *G. and L.* of *Louisville* for value, of which the defendant was duly notified, and by means whereof he became and is liable to pay to *G. and L.*, or their order, the amount thereof, &c. 2, That the assignment of the [*323] note to the plaintiffs was obtained by *fraud. 3, *Nil debet.* 4, Payment to *Stivers* before the note was indorsed to the plaintiffs. There were special demurrers to the first and fourth pleas, which were sustained by the Court. Issues were taken on the second and third pleas. Verdict and judgment for the plaintiffs. The causes of demurrer were, 1, That the facts stated in the pleas might be given in evidence under the general issue; and, 2, That the pleas respectively amounted to the general issue.

It is no objection to a plea, which is well pleaded in other respects, that the matter of it may be given in evidence under the general issue. The right to plead as many pleas as a defendant may deem necessary for his defense, is secured to him by statute. In so pleading, however, it is not his privilege to incumber the record with tautologous allegations, nor with pleas which, while they pretend to be special, amount only to a denial of the plaintiff's allegation.

We do not think that the pleas demurred to in this case, are liable to either of the objections above mentioned. They are not a repetition of matter elsewhere spread upon the record; nor do they amount to the general issue. Both of the pleas confess the plaintiffs' cause of action as stated in the declaration, but avoid it by new matter. A plea amounting to the general issue is a plea alleging matter which is, in effect, a

Swails v. The State, in Error.

denial of the whole, or the principal part of the allegations in the declaration. The remarks of Lord *Denman* in the case of *Hayschlen v. Staff*, 5 Adol. & Ellis, 153, are peculiarly appropriate to this case: "There is a great distinction," says his lordship, "between the case of a plea which amounts to the general issue, and a plea that discloses matter which may be given in evidence under the general issue." Under the latter, various things may be given in evidence which may also be proved under the general issue; "but it is incorrect language to say that these things amount to the general issue; they only defeat the contract: but what, in correct language, may be said to amount to the general issue is, that for some reason specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed."

[*324] *Accord and satisfaction, and payment, are matters which, in this action, may be pleaded specially, for they admit the truth of the declaration, although each of the defenses would, in evidence, maintain the general issue. Gould's Pl., 356.

On account of the error of the Court in sustaining the demurrers to the pleas, and especially as it does not appear that the merits of the case were tried, we are of opinion that the judgment of the Circuit Court should be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiff.

C. Cushing, for the defendants.

SWAILS v. THE STATE, in Error.

EVIDENCE that the defendant had beaten *Catharine Swails*, will not support an indictment for an assault and battery on *Ratharine Swails*.

THE STATE v. HENSLEY, in Error.

THE illegal selection of the grand jurors is no cause for quashing an indictment on motion. *Bellair v. The State*, 6 Blackf., 104.

• GRIFFITH v. HILL, in Error.

IF, after the dissolution of a partnership between *A* and *B*, the parties agree that the former shall pay, with his own funds, certain debts of the latter, and certain debts of the firm, in discharge of a note, which, previously to such agreement, had been given by *A* to *B*, and the payments be accordingly made, such payments, to the amount of the private [*325] *debts of *B*, and of half of the partnership debts, thus paid, constitute a good defense to a suit at law on the note.

NEVILS v. CAMPBELL.

JUSTICE'S TRANSCRIPT.—A *scire facias* on the transcript of a justices judgment for execution against real estate, should show that a transcript of the justices proceedings on the judgment was filed in the Circuit Court.

ERROR to the *Lagrange* Circuit Court.

DEWEY, J.—*Scire facias* on the transcript of a justice's judgment for execution against real estate. The *scire facias* alleges, that the justice filed in the Circuit Court a transcript of a judgment rendered by him in favour of the plaintiff against the defendant below; but it does not state that he filed there a transcript of his proceedings upon the judgment.

James v. The State.

Judgment in the Circuit Court against the defendant by default.

The statute which governs this case required the justice to forward to the Circuit Court a certified transcript of his judgment and proceedings to be filed by the clerk of that Court. R. S., 1838, p. 375. The *scire facias* is fatally defective for not showing, that a certified transcript of the proceedings upon the justice's judgment was filed in the Circuit Court. *Coddling v. Deal*, 6 Blackf., 80. The *scire facias* is in other respects informal; and the judgment of the Circuit Court is equally so.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Howe, for the plaintiff.

W. H. Coombs, for the defendant.

JAMES v. THE STATE.

IDEM SONANS.—An action of debt was brought against *Owen Adanson* and *Joseph James*, on a recognizance alleged to have been entered into by them before a judge for the appearance of said *Adanson*, at the next [*326] term of the Court, to answer a charge of forgery. Averment, that the defendants made default. Plea, *nul tiel record*. An entry on the order book of the Court was offered in evidence to prove the defendant's default, the person accused being in such entry named *Owen Adanson*. Held, that the variance between the names *Owen Adanson* and *Owen Adamson* was immaterial, the principle of *idem sonans* being applicable to the case. (a)

SAME.—The record of a judgment, proved in this cause under a plea of former recovery, was objected to on account of the same variance mentioned above. Held, that the objection was not sustainable.

PLEADING.—Held, also, that if in such case as the above, the causes of action were not the same, that fact should be replied to the plea of former recovery.

RECOGNIZANCE.—*Quære*, whether such a recognizance as that sued on in this case need be recorded?

(a) *Cleveland v. The State*, 20 Ind., 444.

James v. The State.

ERROR to the Vigo Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State against *Owen Adanson* and *Joseph James* in 1843. The declaration contains two counts. The first count, after stating some superfluous matter respecting a petition and writ of *habeas corpus*, is as follows: That on the 6th of *February*, 1841, the defendants entered into a recognizance before a judge of the Circuit Court; that the recognizance was conditioned, that said *Adanson* should appear on the first day of the then next term of said Court to answer a charge of forgery; that the recognizance was duly filed in the clerk's office of said Court, and was also, on the first day of the term next after it was taken, recorded in said Court; that, in the body of the recognizance, the said *Owen Adanson* was described by the name of *Owen Adamson*; that, on the first day of said term of the Court, the defendant *Adanson* was called and made default; and that the other defendant, *James*, was called to bring in the body of said *Adanson*, and he also made default; whereby an action accrued, &c. The second count is similar to the first.

The plaintiff suggested on the record, that the process as to *Adanson* was returned "not found."

The defendant, *James*, pleaded that there were no such judgment and proceedings as are described in the declaration. He also pleaded three pleas of former recovery, but it is only necessary to notice the third one, which is as follows: That on the 10th of *April*, 1842, at said county, the plaintiff sued out of the Circuit Court a writ of *seire facias* against this defendant and said *Owen Adanson* (by the name of *Owen* [*327] **Adamson*) upon the same recognizance, and for the same breach, set out in the declaration: that said *Owen Adanson* described by the name of *Owen Adamson* was not found; that such proceedings were had in said suit that afterwards, to wit, on, &c., the issues joined between the plaintiff and this defendant were found for the latter, and he was accordingly discharged.

Replication to said third plea of former recovery, that there is not any record of the supposed recovery in the plea men-

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tioned. Rejoinder that there is such record. The cause was submitted to the Court.

The plaintiff, under the issue on the plea to the action of *nul tiel record*, proved the recognizance sued on, which is signed by the defendants *Owen Adanson* and *Joseph James*, to have been entered into before the judge as alleged in the declaration; that the recognizance was returned to the Circuit Court, and filed on the same day on which it was taken; that the principal, by the name of *Owen Adamson*, and the surety *Joseph James*, were called on the first day of the term of the Court next after the recognizance was taken; and that they both made default. The principal is named *Owen Adamson* in the entry on the order book by which the default was proved, and the entry of the default was objected to as evidence on account of a variance in the name, he being sued by the name of *Owen Adanson*; but the objection was overruled. We think there was no ground for the objection. The names in question are so much alike that the principal of *idem sonans* applies to them. It has been held that *Beniditto* and *Benedetto* may be considered the same name. *Ahitbol v. Beniditto*, 2 Taunt., 401. So, also, with respect to *Beckwith* and *Beckworth*, *Stewart v. The State*, 4 Blackf., 171. There is, at least, as much difference in the names in those cases as in the names of *Adanson* and *Adamson*.

The plaintiff, supposing it necessary to prove that the recognizance sued on had been copied into the record book of the Court, offered in evidence an entry made in *May, 1841*, in such book, of the recognizance in question. The evidence was objected to, because the principal's signature to the copy of the recognizance is *Owen Adamson* instead of *Owen Adanson*. This objection was correctly overruled, the variance being immaterial. The question discussed by the counsel, [*328] *whether such entry of the recognizance was necessary, need not now be examined.

The defendant, to establish the plea of former recovery, gave in evidence the record of a previous suit by *scire facias*, instituted in 1842 against *Owen Adamson* and *Joseph James*,

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founded on a recognizance agreeing with that described in the declaration in the present action of debt, except as to the name of one of the persons sued, who is stated in the *scire facias* to be *Owen Adamson*. The process in the suit by *scire facias* was returned "not found" as to *Owen Adamson*. The other defendant pleaded to the *scire facias*, *nul tiel record*; and the plaintiff replied there was such record. This issue was found for the defendant, and he was accordingly discharged.

The Circuit Court, on the foregoing evidence, gave judgment in this action of debt for the State.

We think the judgment is erroneous, on the ground that the record of the suit by *scire facias*, as proved, was a bar to the present action. The two actions are, apparently, between the same parties and on the same recognizance. The plaintiff, to show a variance, relies on the circumstance, that the *scire facias* is on a recognizance alleged to have been entered into by *Owen Adamson* and *Joseph James*, and the action of debt on a recognizance averred to have been entered into by *Owen Adamson* and *Joseph James*. The variance here relied on is that between the names of *Adamson* and *Adanson*, which, as before noticed, is immaterial.

If the causes of action were not the same, the plaintiff should have replied that fact to the plea of former recovery, instead of replying *nul tiel record*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Kinney and *S. B. Gookins*, for the plaintiff.

J. P. Usher, for the State.

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*JENKINS v. PREWITT.

NEWLY DISCOVERED EVIDENCE.—A bill of review, on account of newly discovered evidence can not be sustained if, by the use of reasonably active diligence, the evidence might have been known to the complainant before the trial of the first cause.(a)

(a) *Parks v. The Evansville, &c., Co.*, 23 Ind., 567.

SULLIVAN, J.—This is the same cause that was before this Court at the *November* term, 1838, at which time a demurrer was sustained to the bill, and the complainant had leave to amend. An amendment was immediately filed, in which the complainant alleges that the matter on which he founds his application for a review of the original decree, came to his knowledge in the summer of 1828. The remaining allegations are as stated in the published opinion of this Court in 5 Blackf., 7.

The defendant, *Robert H. Prewitt*, (*Byrd Prewitt* having deceased since the original decree was entered), answers the amended bill, and denies that the complainant did not obtain a knowledge of the facts stated in the amendment until the summer of 1828. He also filed two pleas; the first of which sets up the same defense as that contained in the answer; the second is that, by the exercise of ordinary diligence, the plaintiff might have known the facts now relied on at the trial of the original cause. The complainant replied, reaffirming the statements in his bill. A number of depositions were taken, by a large majority of which it is proved that, at and before the time of the trial on the original bill, the fact was notorious that the title to the land in controversy was not in *Ezekiel Jenkins*, but in his wife.

Whether the complainant should produce other testimony than his own affidavit in support of the allegation that the fact on which he relies for a rehearing came first to his knowledge within five years before filing the bill, need not now be decided. It is very clear, from the evidence, that the fact was notorious in the neighbourhood at the time of the original trial, and that the complainant, by the exercise of reasonable diligence, might have known it. The testimony is too strong to admit of doubt on that point.

To sustain a bill of review on account of newly discovered evidence, it is necessary that the matter be not only
[*330] new, *but it must be such as the party, by the use of a reasonably *active* diligence, could not have known. If there be negligence in this respect, it destroys the title to the

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relief prayed. *Young v. Keighly*, 16 Ves., 348; *Blake v. Foster*, 2 Ball & Beatt., 457.

DEWEY, J., having been concerned as counsel, was absent.

Per Curiam.—The bill is dismissed with costs.

C. P. Hester and *A. Kinney*, for the complainant.

H. P. Thornton, for the defendant.

THE STATE, on the Relation of the Inhabitants of Congressional Township, &c., *v.* NEWBY and Others.

SCHOOL COMMISSIONER.—Debt by the State, on the relation of the inhabitants of a congressional township in *Washington* county, against the school commissioner of that county and his sureties, on their bond. The declaration shows that the boundary between the counties of *Washington* and *Orange* runs through said township; that the commissioner had lent out "school money," to secure which he had taken a mortgage for the use of the township; and that, by the commissioner's neglect, &c., the money was lost. *Held*, that the declaration was bad, first, because it was not stated with sufficient certainty that the money belonged to the relators; and, secondly, because there was no averment that the trustees of the township had decided that the commissioner of *Washington* county should have jurisdiction over the school land of the township.(a)

APPEAL from the *Washington* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State on the relation of the inhabitants of a certain congressional township, against *Micah Newby*, the school commissioner of *Washington* county, and his sureties. The following is the substance of the declaration: That the said township is situate in the counties of *Washington* and *Orange*; that the defendants, in *September*, 1837, executed their writing obligatory to the plaintiff in the sum of, &c., conditioned that *Newby*, who, in *August*, 1837, had been elected school commissioner of *Washington* county, should faithfully discharge his duties in that office; that the bond was approved and the commissioner qual-

(a) See *Boyd v. Blaisdell*, 15 Ind., 73.

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ified, that the commissioner, in *October*, 1837, lent to [*331] one *Kendall* a certain sum of "school *money," to be paid in three years; that the borrower mortgaged to the commissioner, for the use of said township, certain land in *Orange* county to secure the loan; that the commissioner neglected his duty, &c., (several breaches are here set out relative to the mortgage); by which neglect the money was lost; that thereby an action accrued, &c.

General demurrer to the declaration, and judgment for the defendants.

The declaration is objectionable, because it does not state that the money lent by the commissioner belonged to the relators. The only allegations relative to this subject are, that the money was "school money," and that the mortgage was to the commissioner and his successor for the use of the township. It is not here stated, with sufficient certainty, that the money in question was the money of the inhabitants of the township.

The declaration is also objectionable, because there is no averment that the trustees of the township had decided, that the school commissioner of *Washington* county should have jurisdiction over the school land of the township. According to the statutes governing the case, such a decision was necessary to give jurisdiction over said school land to the commissioner of *Washington* county; the township being divided by the boundary between *Washington* and *Orange* counties. Stat., 1837, p. 16; R. S., 1838, p. 510, sect. 9. The plaintiff contends, however, that by those statutes, if all the school section lies in *Washington* county, the commissioner of that county has authority over the section without a decision of the trustees. But if that were the meaning of the statutes, it would not help the plaintiff in this case, the declaration not alleging that the section lies in *Washington* county.

Per Curiam.—The judgment is affirmed.

J. Rowland and *W. T. Otto*, for the appellant.

J. W. Payne, for the appellees.

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PLEADING—PRACTICE.—Assumpsit for money paid by the plaintiff for the defendants' use and at his request on a writing obligatory for the payment of money, payable to one *T. W.*, in which the defendant was principal and the plaintiff his surety; and which the plaintiff had to pay. Plea, non-assumpsit without oath. *Held*, that the writing obligatory, not being the foundation of the suit, was not admissible as evidence without proof of its execution by the defendant.

ERROR to the *Randolph* Circuit Court.

BLACKFORD, J.—*Gray* brought an action of assumpsit against *Jessup* before a justice of the peace. The cause of action, as shown by the statement filed, is "for money paid by the plaintiff for the defendant's use and at his request, on a writing obligatory for \$35.00, dated &c., and payable to one *Thomas Ward* six months after date, in which the defendant was principal and the plaintiff his surety; and which the plaintiff had to pay." Plea, non assumpsit. Verdict and judgment for the plaintiff. On the trial, the plaintiff offered in evidence the writing obligatory described in the statement of demand without proving its execution by the defendant. The evidence was objected to, but was admitted. Verdict and judgment for the plaintiff. Where a writing obligatory is the foundation of an action, its execution can only be denied by a plea under oath. *R. S.*, 1838, p. 449. But the action here is assumpsit, and the writing obligatory was only admissible, with other evidence, to show the consideration of the promise on which the suit was founded. The statute, therefore, does not apply to the case, and the execution of the writing obligatory should have been proved.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Brownlee and *B. McClelland*, for plaintiff.

J. Smith, for the defendant.

Chapman v. Harper and Another.

[*333] *CHAPMAN v. HARPER and Another.

OYER—PRACTICE.—In a suit on a promissory note by an indorsee, the note and indorsement, if *oyer* of them has been asked and given, are a part of the declaration.

SAME.—And if the suit on such note be by two persons as indorsees, and the indorsement shown on *oyer* be to only one of them, the suit can not be maintained.

ERROR to the *Kosciusko* Circuit Court.

SULLIVAN, J.—This suit was commenced by *Harper* and *Raiguel*, indorsees of *Liston*, against *Chapman* on a promissory note. The declaration is in the usual form. The defendant pleaded, among other pleas, *nil debet*. The cause was tried by the Court, and judgment given for the plaintiffs.

Before the defendant pleaded, he demanded *oyer* of the writing on which the suit was founded. It was given without objection, and a note corresponding to that set out in the declaration, indorsed to *Harper* alone, was produced.

Several questions are presented for our consideration, but the only one that need be noticed is, whether, if *oyer* be demanded of a promissory note, and it be given without objection, the note thereby becomes a part of the record.

It is well known that *oyer* is not properly demandable of an instrument not under seal, and if it be asked of such an instrument, it may be refused. But although it can not be compelled, yet if it be in fact granted, the party who demanded it may consider the whole of what is set forth as making a part of his adversary's pleading, and use it accordingly. *Smith v. Yeomans*, 1 Saund., 316, note 2; *Jefferey v. White*, Doug., 476; 1 Tidd's Pr., 502; *Deming v. Bullitt*, 1 Blackf., 241. According to the principles of the cases cited, the note with the indorsement became a part of the declaration in this case, and showed that the plaintiffs were not entitled to maintain this suit.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

J. A. Liston, *J. B. Niles*, and *A. L. Osborn*, for the defendants.

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*BRACKENRIDGE v. MCCULLOCH.

SETTING ASIDE JUDGMENT.—A person can not sustain a *scire facias* to vacate a judgment which is regular on its face, and which he obtained at a term prior to that when the *scire facias* issued.

ERROR to the *Allen* Circuit Court.

DEWEY, J.—This was a *scire facias* by *McCulloch* against *Brackenridge* and *Mariam* to show cause why a judgment should not be vacated. The writ, (which was issued in *January*, 1843), alleged that *McCulloch*, at the *April* term, 1838, of the *Allen* Circuit Court, commenced an action of debt against *Dewitt C. Stephens*, *William A. Henderson*, and *Mason M. Mariam*, as partners, trading under the firm of *D. C. Stephens and Co.*, on a promissory note made by that firm; that the process was returned “not found” as to *Stephens*; that *McCulloch* obtained a judgment against *Henderson* and *Mariam*; that, after the rendition of the judgment, *Henderson* died, and *Brackenridge* was appointed his administrator; that *Mariam* was not in fact a member of the firm of *D. C. Stephens and Co.*, and was made a party to the suit by mistake; that one *Zenas Henderson* was a dormant partner of that firm, and as such was one of the makers of the note, but that he had fraudulently induced *McCulloch* to believe he was not a partner, and was, therefore, not sued; whereupon the judgment ought to be vacated, &c. The defendants demurred to the *scire facias*, and the demurrer was overruled. Whereupon the Court adjudged that the judgment in the action of debt be vacated.

We think the demurrer should have been sustained. We know of no principle of law by which a plaintiff can, by *scire facias*, set aside a judgment, regular upon its face, obtained by him at a term prior to that of issuing the *scire facias*, though he may have committed a mistake in obtaining the judgment.

Lewis, Administrator, v. Houston.

[*335] **Per Curiam*.—The judgment is reversed with costs.
Cause remanded, &c.

D. H. Colerick, W. H. Coombs, and R. Brackenridge, for the plaintiff.

H. Cooper, for the defendant.

LEWIS, Administrator, v. HOUSTON.

ADMINISTRATOR—WASTE—PRACTICE.—Petition in the Probate Court against an administrator for payment of a judgment against his intestate, alleging waste, &c. The petition was filed in 1842, and before the expiration of a year from the time of the defendant's appointment as administrator. *Held*, that, without evidence of waste, the suit could not be sustained.

APPEAL from the *Fayette* Probate Court.

BLACKFORD, J.—This is a petition, in the nature of a bill in chancery, filed in *July*, 1842, in the Probate Court of *Fayette* county, by the appellee against the administrator of *Theodore R. Lewis*, deceased. The petition states that the plaintiff obtained judgment at the fall term of the *Fayette* Circuit Court, 1841, against the intestate for a certain sum of money, which remains unpaid; that the intestate died in the fall of 1841, subsequently to the judgment, leaving a large quantity of goods and chattels; that the defendant had obtained letters of administration on the estate, received said goods and chattels, and wasted them, &c. Prayer, that the defendant show cause why he should not pay the judgment, and why he should not be removed as administrator.

The defendant, in his answer to the petition, admits the existence of the judgment, but insists that it is void as having been obtained by fraud. He denies the alleged waste, and relies on the fact that the petition was filed before the expiration of a year from the time of his appointment as administrator. The cause was tried on its merits by the Court, and judgment rendered against the defendant for one-half of the amount of the judgment described in the petition.

Lewis, Administrator, v. Houston.

The suit being objected to on account of the time of its commencement, and the objection appearing on the face of the petition, the plaintiff was authorized to proceed only [*336] in *consequence of the allegation of waste. R. S., 1838, pp. 182, 191. The record, which contains all the evidence given in the cause, does not show that there was any proof whatever of the waste charged in the petition; and the judgment for the plaintiff is consequently erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith and *J. S. Newman*, for the appellant.

S. W. Parker, for the appellee.

END OF NOVEMBER TERM, 1844.

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*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1845, IN THE TWENTY-NINTH
YEAR OF THE STATE.

CONNER and Another v. MYERS.

USURY—EQUITY PRACTICE.—Courts of equity will follow the law in the construction of the statute of usury.

SAME.—But on bill filed to be relieved against an usurious contract, the complainant will be required to pay the defendant what is *bona fide* due to him, deducting the usurious interest.

SAME.—The bill must show that such payment has been made, or it must contain an offer to make it.

SAME.—When a borrower has paid the money upon an usurious contract, a Court of equity will assist him to recover back the excess paid beyond principal and lawful interest.

ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—Chancery. The bill sets forth the following facts: On the 6th of *February*, 1829, one *John Conner* borrowed of the defendant \$75.00, and gave his note payable on the 1st of *May* following, bearing interest at the rate of 25 per cent. per annum. On the 18th of *June*, 1832, *John Conner* executed another note to the defendant for the sum of

\$103, payable on the 1st of *December*, 1833, bearing like interest as the first note. The second note, it is alleged, was given for the usurious interest that had accrued on [*338] the *first note, and as "bonus for a disappointment" in the non-payment of the note for \$75.00 when it fell due. On the 9th of *August*, 1836, *John Conner*, together with *J. M. Conner*, one of the complainants, as his surety, executed to the defendant a third note for the sum of \$200, the consideration of which was the interest on the first and second notes calculated at the rate of 25 *per cent. per annum*.

On the 4th of *March*, 1838, the complainants purchased from *John Conner* a farm in the county of *Fayette*, and assumed the payment to *Myers* of the above described notes. On the 9th of *August* following, the complainants and *Myers* accounted together of the interest then due on the several notes, and, computing the interest at the rate of 25 *per cent. per annum*, the sum of \$131.50 was found to be due. The complainants thereupon paid to *Myers* the sum of \$115.50, part of said interest money, and one of them, *James M. Conner*, gave his note to *Myers* for the residue, being \$16.00. On the 10th of *August*, 1840, the complainants, in further discharge of said debts, assigned to *Myers* two land certificates for one hundred and sixty-four acres of land in *Wabash* county, being part of the lands granted for the construction of the *Wabash* and *Erie* canal. The land was estimated by the parties to be worth \$600, from which, however, was to be deducted the sum of \$184.50, a balance still due to the State, which was a lien upon the land, and which *Myers* agreed to pay. The note for \$200, and the note of *J. M. Conner* for \$16.00, were then given up to the complainants, but the note for \$75.00, and the note for \$103, were retained by *Myers*. The bill charges that the conduct of *Myers* in the foregoing transaction was illegal, oppressive, and usurious; that the whole amount of money loaned or advanced by *Myers* to *John Conner* or to the complainants, was \$75.00 only; and that the whole indebtedness was discharged before the assignment of the land certificates, &c. The

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prayer of the bill is for a re-assignment of the land certificates and for general relief.

The answer of *Myers* admits the execution of the notes set out in the bill. He says that the note for \$75.00 did not stipulate for any rate of interest whatever. He says that the note for \$103 was for interest due on the first note, and for other demands he had against *John Conner*, and [*339] that *it bore 25 *per cent.* interest. He admits that at the time he received the note for \$200, as well as at the time of the assignment of the land certificates, "interest was understood to have been computed on the note for \$75.00 and the note for \$103 at the rate of 25 *per cent. per annum.*" He admits the payment of \$115.50 as alleged by the complainants; that the land certificates had been assigned to him; and that the land was valued at \$600.

A replication was filed and depositions were taken. At the hearing, the Court dismissed the bill for want of equity.

In the examination we have given this case, we have not inquired whether the note for \$103, and the note for \$200, were given on a valid and binding consideration or not. If *John Conner* were the complainant here, it may be that he would be entitled to relief of a very different character from that which these complainants have a right to ask. They received from *John Conner* a farm, in consideration of which they undertook to pay the notes above described, with all the interest upon them that could be legally demanded. Have they done so, is the question to be settled. If they have, it is all that *Myers* can require of them, and more perhaps than he could have enforced against *John Conner*. Courts of equity will follow the law in the construction of the statute against usury, but on bill filed to be relieved against an usurious contract, they will require the plaintiff to pay to the defendant what is really and *bona fide* due to him, deducting the usurious interest; and it must appear in the bill that it has been done, or an offer to do so must be made.

The evidence in the cause satisfies us, that all that was legally due to the defendant on the three notes of *John Conner*

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was paid by the assignment of the land certificates. The note for \$75.00 was given at a time when, by law, not more than 6 *per cent. per annum* could be demanded. So with the note for \$200, unless a higher rate of interest were stipulated for in writing, but then it could not exceed 10 *per cent.*, and we have no evidence that this note contained such a stipulation. The note for \$103 was given at a time when the law allowed any rate of interest that the parties might contract for. By calculating the interest on the note for \$75.00, and on the note for \$200, at the rate of 6 *per cent. per annum*, and on the [*340] note for \$103 at the rate of 25 *per cent. per annum*, from the 9th of August, 1836, (at which time the interest on the first and second notes was settled by the note for \$200), to the 10th of August, 1840, when the land certificates were assigned, and estimating the lands, after deducting the \$184.50 due to the State, to be worth \$415.50, and applying the \$115.50 paid on the 9th of August, 1838, to the note bearing 25 *per cent. interest*, the debt is overpaid. As the parties did not make the application of that payment, it is the duty of the Court to do it, and it should be done in reduction of the debt that is most oppressive and unconscientious.

When a borrower has paid the money upon an usurious contract, a Court of equity will assist him to recover back the excess paid beyond principal and lawful interest.(1) But that rule will not apply in this case. The complainants are not the borrowers. They assume the payment of the notes for a valuable consideration paid to them by the borrower. He is the sufferer, not the complainants. From the view we have taken of the case, the Circuit Court erred in dismissing the bill.

The Court reversed the decree with costs, and decreed that the note for \$75.00 and that for \$103 were satisfied, and should be delivered up, &c.

C. B. Smith and J. A. Fay, for the plaintiffs.

S. W. Parker, for the defendant.

(1) The excess may also be recovered in an action at law. *Smith v. Bromley*, Dougl., 696, note; *Browning v. Morris*, Cowp., 790; *Bond v. Hays*, 12 Mass., 34; *Wheaton v. Hibbard*, 20 Johns., 290; 1 Story's Eq., 301.

Jones and Another v. Myers and Others.

JONES and Another v. MYERS and Others.

SURRENDER OF MORTGAGE.—A second mortgagee, before forfeiture, filed a bill in chancery against the first mortgagee to compel him to surrender his mortgage, alleging that it had been paid. The bill did not show that the complainant was injured or was likely to be injured by the alleged incumbrance. *Held*, on demurrer, that the bill could not be sustained.(a)

[*341] *ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—This bill was filed by the complainants as the second mortgagees of a tract of land, and the object of it was to compel the first mortgagee to deliver up his mortgage to be canceled, and for an injunction. The bill states that in the year 1833, one *John Conner* being indebted to the defendant, *Myers*, in the sum of \$103, mortgaged to him as a security for said debt about eight acres of land situate in the south half of the northeast quarter of section 22, in township 13, and range 12 east; that, afterwards, *John Conner* conveyed the same land in fee to *Wilson Conner* and *James M. Conner*, for a valuable consideration; that *Wilson Conner* and *James M. Conner*, being indebted to the complainants in a large sum of money, did, on the 10th of *June*, 1841, mortgage said tract of land to them, the condition of which was that if said *W.* and *J. M. Conner* should pay to the complainants the debt they owed them within three years from the date of said deed, it should be void. The bill then alleges that the debt to *Myers*, which the first mortgage was intended to secure, has been fully paid, notwithstanding which *Myers* refuses to surrender or yield up said mortgage, but holds on to it, denying the payment, and threatens to file a bill to foreclose the same, &c. The prayer of the bill is to compel a surrender of the first mortgage, and to enjoin *Myers* from proceeding to foreclose. *Myers*, *Wilson Conner*, and *James M. Conner* are made defendants to the bill. The defendants demurred. The Court sustained the demurrer, and dismissed the bill.

(a) *Francis v. Porter*, 7 Ind., 213.

Schuer v. Veeder.

The Court did not err in sustaining the demurrer. This bill was filed in *February*, 1842, more than two years before the complainants' debt became due, and they have not shown that they were injured or likely to be injured by the alleged incumbrance. If they had shown that the existence of *Myers'* mortgage was a prejudice to their security, rendering it less valuable—as, for example, that the land mortgaged was not sufficient to pay both debts, or that the whole was but a slender or doubtful security for their debt, and that while the first mortgage remained unsatisfied, they could not make their security available for the full amount—their case would have been entitled to much consideration. But as it is, we do not perceive but that they have ample security for their [*342] *debt irrespective of the mortgage to *Myers*, and are in no danger of being injured. The complainants, then, have shown no reason for this application, and the bill was properly dismissed. On bill filed after forfeiture, the Court will decree between the mortgagees according to their respective interests.

Per Curiam.—The decree is affirmed, with costs.

C. B. Smith, for the plaintiffs.

S. W. Parker, for the defendants.

SCHUER v. VEEDER.

TRESPASS.—Trespass lies for a direct and violent injury to personal property, whether the act be done intentionally or through negligence.

CASE.—Case also lies for such injury if it was occasioned by the defendant's *carelessness*, and the act was not willfully done.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—Case for so negligently managing the defendant's boat that it violently struck and sunk the plaintiff's boat. General demurrer to the declaration sustained, and final judgment for the defendant.

Anderson v. Farns.

The question here raised is whether a direct and forcible injury to property, not intentional, but the result of carelessness, may be the subject of an action on the case, or whether trespass is the only remedy?

There is no doubt that, at common law, trespass will lie for a direct and violent injury, whether inflicted through negligence or intentionally. *Leame v. Bray*, 3 East, 593. And, since the decision of the case of *Williams v. Holland*, case has also been a legal remedy for such an injury, if occasioned by carelessness, but not if willfully done. 10 Bing., 112. See, also, *Ogle v. Barnes*, 8 T. R., 188; *Blin v. Campbell*, 14 Johns., 432. The demurrer should have been overruled.(1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiff.

G. S. Orth, for the defendant.

(1) Vide R. S., 1843, p. 691; *Hines v. Kennison*, May term, 1846.

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*ANDERSON v. FARNs.

JURISDICTION OF JUSTICE.—Debt before a justice of the peace on a bond in the penalty of \$500. The plaintiff claimed \$50.00 in damages. *Held*, that the justice had jurisdiction.

INDEMNIFYING BOND.—A bond to indemnify an officer against a lawful or an apparently lawful act is valid. *Aliter*, if the act be unlawful.(a)

ERROR to the *Randolph* Circuit Court.

DEWEY, J.—Debt before a justice of the peace by *Anderson* against *Farns*. The statement of the plaintiff's demand was a bond against the defendant, in the penalty of \$500, and conditioned, after reciting that the plaintiff, a constable, had levied certain executions on certain property as belonging to the defendant and a certain other person, (which property had

(a) *Daniels v. Barney*, 22 Ind., 207.

been given up by the defendant) that the defendant should indemnify and save harmless the plaintiff from all penalties, costs, damages, attorney's fees, and expenses, arising from the seizure and sale of the property. The plaintiff's demand was limited to \$50.00 in damages sustained by a breach of the condition of the bond, as appeared by a bill of particulars filed with the bond. On appeal to the Circuit Court, the action was dismissed for the want of a sufficient statement of the plaintiff's demand.

The decision of the Circuit Court is attempted to be sustained on two grounds: 1st, That the plaintiff's demand was above the jurisdiction of the justice of the peace; and, 2d, that the bond is void upon its face.

Neither objection is well founded. We have repeatedly decided that justices may take cognizance of bonds, the penalty of which is over \$100, if the amount actually claimed by the plaintiff is under that sum. *Washburn et al. v. Payne*, 2 Blackf., 216. In this cause the plaintiff claimed but \$50.00 in damages; and the justice, therefore, had jurisdiction of the cause.

There is nothing on the face of the bond to impeach its validity. Its object was to indemnify the constable against the consequences of the seizure and sale of property on executions. The property was taken as belonging to the defendant and a certain other person; and there is nothing in the recital in the condition of the bond to show that the taking and sale of the property were illegal acts. A bond [*344] to *indemnify an officer against lawful or apparently lawful acts, is valid; but it is otherwise if the act be illegal. Chitt. on Cont., 527; *Blackett v. Crissop*, 1 Ld. Raym., 278, *per Powell*, justice. See, also, *Wright v. Verney*, 3 Dougl., 240. There might have been so much doubt as to the ownership of the property levied on, as to render it prudent for the constable to accept the bond, and there is nothing in public policy which forbade his doing so; nor is there any want of consideration for such a bond. Chitt. on Cont., *supra*.

The Circuit Court erred in dismissing the action.

Bowser and Another v. Bliss and Others.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Brownlee and *B. McClelland*, for the plaintiff.

J. Smith, for the defendant.

BOWSER and Another v. BLISS and Others.

CONTRACT IN RESTRAINT OF TRADE.—A contract in restraint of the right of making, selling, and trading fanning-mills south of the *Wabash* river, within thirty miles of *Marion*, in *Grant* county, is not objectionable on account of the extent of space to which it extends, nor because the restriction is indefinite in point of time.

BURDEN OF PROOF.—Suit on a note for the payment of money, given for the right to make and sell fanning-mills within certain limits. It appeared by the note and an article of agreement, that the note was to be paid, provided the payee did not make or sell, within the prescribed limits, more than four such mills. *Held*, that, on the question whether the plaintiff had made or sold, as aforesaid, more than four such mills, the burthen of proof was on the defendant.

ERROR to the *Grant* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Bliss* and others against *Bowser* and another. The suit was founded on the following sealed note: "One year after date, we or either of us promise to pay *Henry Bliss*, *Allison*, and *Ellis*, \$150, value received, provided the firm of *Bliss*, *Allison*, and *Ellis*, do not make, or sell, or trade, any fanning-mills, within thirty miles of *Marion*, south of the *Wabash* river. 30 *July*, 1840. *Jacob C. Bowser*, [SEAL]. *James Story*, [SEAL]." The declaration avers that the plaintiffs have not at any time, since the making of said note, made, sold, or traded, any fanning-mills within thirty miles of *Marion*, south of the *Wabash* river, with the exception of four, the right to

[*345] *sell which four was specially reserved to the plaintiffs by a certain article of agreement entered into by the plaintiffs and defendants on the same day with said note.

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The article of agreement referred to in the declaration, and executed by the plaintiffs and defendants, is substantially as follows: "Article of agreement made and agreed upon this day between *Henry Bliss, James J. Allison, and John W. Ellis*, of the one part, and *Jacob C. Bowser and James Story* of the other part. The party of the first part bargain and sell their right of making, selling and trading fanning-mills south of the *Wabash* river, within thirty miles of *Marion*, in *Grant* county. And whereas the party of the second part have given their obligation to the party of the first part for \$150, payable one year from this date, provided said party of the first part comply with the agreement after this date, with exception of four now on hand. . If the party of the first part do make or sell any within the distance above mentioned, the obligation for \$150 shall be void and of no effect. The party of the first part hold themselves liable for \$20.00 for every fanning-mill they may sell or trade within the bounds above mentioned, to the party of the second part. Dated the 30th of *July*, 1840."

The defendants pleaded as follows: 1, *Nil debent*; 2, The plaintiffs did sell and trade divers fanning-mills within thirty miles of *Marion*, south of the *Wabash* river, to divers persons; 3, The plaintiffs did sell five fanning-mills within thirty miles of *Marion*, south of the *Wabash* river; 4, There is no such article of agreement as mentioned in the declaration. General demurrer to the second plea, and the demurrer correctly sustained. Replication in denial of the third plea. The fourth plea, not being sworn to, was correctly set aside on motion of the plaintiffs.

On the trial of the issue on the third plea, the plaintiffs gave in evidence the writing obligatory, and the article of agreement above described, and proved that they were partners. It also appeared that the defendants were partners. There was no other evidence.

The Court instructed the jury, that it lay on the defendants to prove, that the plaintiffs had sold more than four fanning-mills south of the *Wabash* river, within thirty miles of *Marion*. The defendants excepted to this instruction.

*346] *Verdict for the plaintiffs. Motion for a new trial overruled, and judgment on the verdict.

The first error assigned is, that the contract was illegal as being in restraint of trade. But this objection is unfounded. There is this distinction on the subject: Where the contract is for the *general* restraint of any business, it is illegal; but it is otherwise, if the restraint be *partial* and reasonable. *Mitchell v. Reynolds*, 1 P. Will., 181, the leading case on the subject. There must also be a valuable consideration for the contract; such a consideration as is necessary in other contracts. *Hitchcock v. Coker*, 6 Adol. & Ellis, 438. In the case before us, the restriction, as it regards the space, is not unreasonable, considering the nature of the business and the newness of the country. The circumstance that the restraint is indefinite in point of time, does not invalidate the contract. This objection—the want of limit as to time—has been recently very fully discussed in the *English Courts*. In the King's Bench, the objection was sustained; but the decision was reversed in the Exchequer Chamber. In the last named Court, *Tindal*, C. J., said, that in many of the cases cited, the restriction had been held good, though it continued for the life of the party restrained. On the other hand, no case had been referred to, where the contrary doctrine had been laid down. He cited the cases of *Bunn v. Guy*, 4 East, 190, *Chesman v. Nainby*, 2 Strange, 739, and *Wickens v. Evans*, 3 Younge and Jervis, 318, to support the position, that the agreement was not void merely on the ground that the restriction was indefinite as to duration, the same being in other respects a reasonable restriction. *Hitchcock v. Coker*, above cited.

It is also assigned for error, that the instruction to the jury is contrary to law. It appears to us that the instruction is unexceptionable. The note and the article of agreement having been made at the same time, formed one contract; and the question, so far as the instruction is concerned, was, whether the plaintiffs had afterwards sold more than four mills within the space described in the agreement? The affirmative of that question was with the defendants, and the burthen of proof,

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therefore, according to the general rule in such cases, [*347] was upon them. *Ei incumbit probatio qui dicit, *non qui negat.* 1 Stark. Ev., 418. It was scarcely possible for the plaintiffs to prove the negative of the issue, viz., that they had not sold the mills which they were not to sell; but if they had sold them, the sale might be ascertained and proved by the defendants. The negative, when it involves a criminal omission by the party, must be proved. *Williams v. The East India Co.*, 3 East, 192; but that is an exception to the rule, and does not affect this case.

Taking the note and article of agreement together, the evident meaning of the contract is, that the plaintiffs were to have the money for which the note was given, unless they should sell more than four mills within the space specified. And there being no evidence that the plaintiffs had made such sale, they must be entitled to recover.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. Brownlee, for the plaintiffs.

T. J. Sample, for the defendants.

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*HAMILTON v. WORT.

AWARD—INTEREST.—An award for a certain sum of money carries interest, by the statute of 1831, from the time the money was payable by the award.
SAME—COSTS.—If an award be silent as to the costs, a judgment for them is erroneous.

ERROR to the *Washington* Circuit Court.

BLACKFORD, J.—The parties in this suit entered into bonds, submitting certain matters in difference between them to arbitration; and an award was made in favor of *Wort*. The award states, among other things, that *Hamilton* should pay *Wort* a certain sum of money within five months from the date of the award; but it is silent as to the costs of the suit. The

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Court, on motion of *Wort*, granted a rule on *Hamilton* to show cause why the award should not be made the judgment of the Court. No sufficient cause being shown in answer to the rule, judgment was rendered on the award, with interest from the time the money was payable by the award, and also for costs.

The judgment is objected to on two grounds: First, because it is in favor of the plaintiff, not only for the sum awarded to be due him, but also for interest. Secondly, because it is in favor of the plaintiff for costs.

The first objection is not tenable. We think that according to the spirit of the statute of 1831, which governs this case, the sum awarded carried interest from the time it was payable. R. C., 1831, p. 290. The second objection is valid. The award being silent as to costs, the judgment for them is erroneous. *Jacobs v. Moffatt*, 3 Blackf., 395.

[*349] **Per Curiam*.—The judgment as to the costs is reversed, and affirmed as to the residue.

H. P. Thornton, for the plaintiff.

A. C. Griffith, for the defendant.

MACY v. HOLLINGSWORTH.

EXECUTION—PRACTICE.—Assumpsit by the assignee against the assignor of a promissory note. A judgment had been obtained against the maker and a *fi. fa.* issued in due time. The *fi. fa.* was returned levied on certain property, which remained unsold for want of buyers. About five months after said return, an *alias fi. fa.* issued and was returned no property found. *Held*, that the second execution and the proceedings on it were void; that on the return of the first execution, a *venditioni exponas* should have issued; and that, under the circumstances, the plaintiff could not recover.

APPEAL from the *Union Circuit Court*.

SULLIVAN, J.—Assumpsit by *Hollingsworth* as the assignee against *Macy*, administrator of *Macy*, the assignor of a promissory note. The note was made by one *Hutchinson* payable to *F. Macy*, now deceased. On the 3d of March, 1842, and

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after the note fell due, *F. Macy* assigned it to *Hollingsworth*, who on the same day assigned it to *J. B. Rose*. *Rose* immediately commenced a suit against the maker, and at the next term of the Court recovered a judgment against him for the amount of the note. An execution of *fi. fa.* was promptly issued, and there being no personal property, it was levied on the equity of redemption which *Hutchinson* had in certain lots in the town of *Liberty*, valued according to the statute then in force at \$110. The sheriff exposed the property to sale, but there was no sale for want of buyers, and on the 24th of *September*, 1842, the execution was returned accordingly. On the 20th of *February*, 1843, an *alias fi. fa.* was issued and levied on the same property described in the return to the first writ. By the direction of *Rose*, the property levied on was again valued, and the appraisers certified that it was of no value; that the lots were not worth the debts for which they were mortgaged. The sheriff, thereupon, returned that he could find no property of the defendant subject to the execution.

Rose then sued *Hollingsworth* on his assignment and [*350] recovered; and *Hollingsworth* now *prosecutes this suit against the administrator of his assignor. The foregoing facts appear in the declaration, to which there was a special demurrer. Demurrer overruled and judgment for the plaintiff.

The question which immediately affects the merits of this case is, whether legal diligence was used by *Rose* in prosecuting the maker of the note to insolvency, for if it was not, the plaintiff in error may avail himself of the neglect notwithstanding he is not the immediate assignor of *Rose*. Due diligence, in a case of this kind, requires not only that suit should be commenced in a reasonable time, but that it should be prosecuted according to the forms of law to judgment and execution without unnecessary delay. No want of diligence in this case is charged against *Rose* in commencing the suit, or in obtaining a judgment, or in issuing the first writ of *fi. fa.* The negligence complained of consists in delaying to enforce execution after the writ issued.

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The first execution was returned on the 24th of *September*, 1842, showing a levy, an offer to sell, and that the property levied on did not sell for want of buyers. In such case the statute requires a *renditioni exponas* to issue, commanding the sheriff to expose to sale the property so levied on. This was not done, but on the 20th of *February* following an *alias fi. fa.* was issued, which was returned *nulla bona*. The second writ, and all the proceedings upon it, were irregular and void; for where a writ of *fi. fa.* is levied on property, a second writ of the same character can not issue on the same judgment until the property levied on be disposed of, unless it clearly appear that the property will not pay the debt.

The two writs in this case were levied on the same property, and it is contended that as by the second appraisement, it appeared that the interest of the execution-defendant in the lots was of no value, and that he had no other property on which to levy, it is sufficient evidence of his insolvency.

The question we are considering is, whether proper diligence was used by the assignee of the note to recover the money from the maker before he became insolvent. The argument of the defendant does not meet that question. If the first levy had been followed up by a *renditioni exponas*, the judgment or a part of it might have been collected. The [*351] mode of enforcing the judgment, as prescribed by the statute, would, at all events, have been observed. The levy on the first writ in this case has not been legally disposed of. Without prejudging what would be the effect of a proper disposition of that levy, accompanied by proof of the insolvency of the maker of the note at the time the levy was made, we are of opinion that, upon the facts stated in the record, the plaintiff below can not recover.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid, for the appellant.

J. Yaryan, for the appellee.

Hart v. Crow and Wife.

HART v. CROW and WIFE.

HUSBAND AND WIFE—LIBEL.—A suit can not be sustained by husband and wife for a libel on them both.

SAME.—In the case of such libel there should be two actions, one by the husband for the injury to him, and the other by husband and wife for the injury to the wife.(a)

ERROR to the *Warrick* Circuit Court.

SULLIVAN, J.—This was an action on the case by *Crow* and wife against *Hart* for a libel on the plaintiffs, written and posted up by the defendant in a place of public resort. The declaration alleges that the defendant, wickedly and maliciously intending to injure the plaintiffs in their good name, &c., and to cause it to be believed by their neighbours and others that they had been and were guilty of the crimes of lying and stealing, and to subject them to the scorn of their neighbours, &c., did, on, &c., at, &c., falsely, wickedly and maliciously, compose and publish, of and concerning the plaintiffs, a certain false, scandalous, malicious and defamatory libel, &c. The alleged libel is then set out, and charges that *John Crow* and his wife are liars, rogues, &c. By means whereof the plaintiffs have been greatly injured, &c. Demurrer to the declaration overruled, and joint damages assessed upon a writ of inquiry.

There are some questions raised on the admissibility of certain testimony that was objected to on the execution [*352] of the writ of inquiry, but the case does not require that we should decide them. The Court erred in overruling the demurrer to the declaration. The suit is brought not only for the injury sustained by the wife, but for the wrong done to the husband also. The action is joint, and joint damages are sought to be recovered. Two separate causes of action are shown, accruing to different persons, that can not be united in the same suit. For the injury done to the wife, the husband must join in the suit; but the declaration must

(a) *Long v. Morrison*, 14 Ind., 595.

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show that it is for the wrong done to the wife that the suit is prosecuted. For the injury done to the husband, he alone should sue.(1) In *Newton et ux. v. Hatter*, 2 Ld. Raym., 1208, the suit was brought for a battery committed on both. There was a judgment by default, and a writ of inquiry was executed. On the return of the writ, judgment was arrested because the wife could not be joined in an action with the husband for a battery on the latter. If the defendant had pleaded to the declaration, and the cause had gone to a jury, and separate damages had been given for the injury to the wife, it may be that the verdict might have been sustained. Bull. N. P., 21; Cro. Jac., 655; 3 Binney, 555.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Lockhart, for the plaintiff.

J. R. E. Goodlet, for the defendants.

(1)1 Selw. N. P., 297. So, if slander be spoken by husband and wife, there must be separate actions, one against the husband only, for the slander spoken by him, and the other against the husband and wife, for the slander spoken by the wife. *Errington v. Gardiner*, Ib.

A suit by husband and wife can not be sustained for words spoken of the wife not actionable in themselves, and which are only actionable on account of special damage to the husband. *Saville et ux. v. Sweeny*, 4 Barn. & Adol., 514.

[*353] *HANNEGAN v. HANNAH and Others.

DEBTOR AND CREDITOR—SECURITIES.—In general, a creditor having a right to resort to two safe and sufficient funds for satisfaction of his debt, may be compelled, in equity, by another creditor of the same debtor having a lien on one of those funds only, to look to that fund which the latter can not touch, or, if the former creditor have exhausted the fund bound for the debts of both creditors, leaving the other fund unexhausted, that fund may be reached by the unsatisfied creditor, by the application of the principle of substitution.

SAME.—But there is no rule in equity, by which a creditor can be compelled to accept a security for his debt, or by which another creditor can resort to it in his place, after he has rejected it.

Hannegan v. Hannah and Others.

ERROR to the *Wayne* Circuit Court.

DEWEY, J.—This was a bill in equity. It states that *Fisher*, one of the defendants, being indebted to the complainant, *Hannegan*, in the sum of \$1,200, mortgaged certain real estate to him to secure the debt; that previously to the execution of the mortgage, *Elsberry* and *Clark*, also defendants, obtained judgments against *Fisher*, which were liens upon the mortgaged premises; that, after the date of the mortgage, *Fisher* made a deed of trust to certain trustees, other defendants, of all his real and personal property, for the benefit of certain of his creditors, who are likewise defendants; that the judgment-debts of *Elsberry* and *Clark* were amply provided for in the deed of trust, but that the complainant's debt was not secured by it; that a majority of the creditors accepted the deed of trust, and some of them received dividends from the trustees, who still held undistributed \$1,000 of the trust funds; that *Elsberry* and *Clark*, not choosing to avail themselves of the deed of trust, sued out executions and caused the mortgaged premises to be sold, thereby satisfying their judgments, but leaving no overplus to be applied to the mortgage-debt of the complainant; and that the complainant lost, by the sale of the mortgaged premises, the only fund to which he could look for the payment of his debt, *Fisher* being entirely insolvent. The prayer of the bill is, that the complainant may be substituted in the place of *Elsberry* and *Clark*, and that the trustees be decreed to pay to him whatever they were entitled to under the deed of trust.

[*354] *The defendants demurred to the bill; the demurrer was sustained and the bill dismissed.

The plaintiff in error contends that the decree is erroneous, on the ground that *Elsberry* and *Clark* held liens on two funds out of which to satisfy their debts against *Fisher*—one by virtue of their judgments, and the other under the deed of trust; and that the complainant having a lien on one of the funds only (the mortgaged premises), which has been exhausted by *Elsberry* and *Clark*, has a right to be placed in their stead as to the other fund, the deed of trust.

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It is in general true, that a creditor having a right to resort to two safe and sufficient funds for the satisfaction of his debt, may be compelled in equity by another creditor of the same debtor, having a lien on one of those funds only, to look to that fund which the latter can not touch, or, if the former creditor have exhausted the fund bound for the debts of both creditors, leaving the other fund unexhausted, that fund may be reached by the unsatisfied creditor, by the application of the principle of substitution. 1 Story's Eq., 479, 589, in note 3; *Wright v. Morley*, 11 Ves., 12; *Selby v. Selby*, 4 Russ., 336; *Aldrich v. Cooper*, 8 Ves., 382. But this doctrine is not applicable to the cause before us. *Elsberry* and *Clark*, in whose place the complainant seeks to be substituted, never had any other liens than those of the judgments; they did not execute the deed of trust, and never assented to it. On the contrary, as the bill states, they refused to avail themselves of it, and proceeded to execute their judgments. Had they accepted the deed of trust, as additional security to the liens of the judgments, there might, perhaps, have been some ground for the application of the doctrine. But there is no rule of equity by which a creditor can be compelled to accept a security, or by which another creditor can resort to it in his place, after he has rejected it. The decision of the Circuit Court was correct.

Per Curiam.—The decree is affirmed with costs.

J. B. Julian, for the plaintiff.

J. S. Newman, for the defendants.

*355] *THE STATE, on the Relation of LOWRY, v. BODLY and Another.

ELISOR.—The Circuit Court may appoint an elisor in a cause in which the sheriff is a party, there being no coroner in attendance; and a person, though he have served under the sheriff as bailiff to the petit jury in other causes, may be appointed such elisor.

PRACTICE.—If after the refusal of the Court to reject a plea, the plaintiff

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reply to or join issue on the plea, the refusal to reject the plea can not be assigned as error.

SAME—**PROOF OF HAND-WRITING**.—If the subscribing witness to a bond reside out of the State, the plaintiff may prove his handwriting, although the defendant have procured his deposition and filed it in the cause. But if after a refusal in such case to receive evidence of the handwriting of the witness, the plaintiff resort to the deposition to prove the execution of the bond, such refusal can not be assigned as error.

SAME.—Whether a bond sued on was delivered as an escrow, and whether an alteration made in it after its delivery destroyed its identity, &c., are questions for the jury; and to enable the jury to determine those questions, they should have the bond before them.(a)

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—This was an action of debt, commenced before a justice of the peace, in the name of the State for the use of *John Lowry*, against *Bodly* and *Orr*, on a bond alleged to be executed by them and one *Payne*, since deceased, conditioned for the faithful discharge of the duties of a justice of the peace by *Payne*. On appeal to the Circuit Court, the defendants pleaded: 1, That the bond was obtained from them by fraud, in this, viz., that they were induced to execute the same by the false and fraudulent representation of *Payne*, the principal, that one *Brier* would also execute it as a co-obligor; but that *Brier* refused. 2, That the instrument was delivered by the defendants to *Payne* as an escrow, to be delivered to the plaintiff on condition that *Brier* should also execute it, otherwise to be re-delivered to the defendants; and that *Brier* refused to sign it; wherefore it was not their deed. 3, *Non est factum*, verified by oath.

The plaintiff moved the Court to reject the two first pleas. The motion was overruled, and the plaintiff replied in denial of the first plea, and took issue upon the second. Verdict and judgment for the defendants.

The regular panel of the jury having been summoned by *Bodly*, one of the defendants, who was the sheriff, the plaintiff challenged the array; and the challenge was allowed.

[*356] *The plaintiff then moved the Court to appoint an

(a) See *Deardoff v. Foresman*, 24 Ind. 451.

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elisor to act during the trial of the cause; and the Court appointed a person who had served in the capacity of bailiff to the petit jury in other causes under *Bodly*. The elisor summoned a jury to try the cause, and the plaintiff challenged the array, but the challenge was overruled.

On the trial the plaintiff produced the bond on which the action is founded, and which purported to be attested by one *Gerould*, who, it was proved, was the deputy of the clerk of the Court in which the bond was filed; and having shown that *Gerould* was not a resident of this State, but lived in *Michigan*, the plaintiff proposed to establish the execution of the bond by proof of the handwriting of the subscribing witness. The defendants objected. Their objection was founded on the fact that they had, themselves, procured the deposition of *Gerould* respecting the execution of the bond, which deposition was on file in this cause. The Court sustained the objection and rejected the testimony. The plaintiff then read the before-named deposition of *Gerould*, in which he testified that he wrote the bond in question, and inserted, in the body of it the name of *Payne*, and the names of the defendants and *Samuel Brier*, as his sureties; that *Payne* and *Bodly* signed the bond in the clerk's office, to whose signatures only the witness attested; that when *Bodly* was about to sign, he asked *Payne* "*Brier* will sign this, won't he?" *Payne* answered "Yes, he agreed to;" that *Bodly* left the office and *Payne* took the bond away to get the other names to it; that he returned in a short time, in the absence of *Bodly*, and erased the name of *Brier*, saying he had gone home, he believed, and that the bond was sufficient. The witness then filed away the bond in the clerk's office. The plaintiff proved the execution of the bond by *Orr*, the other defendant, and proposed to read it to the jury, but an objection being made the Court excluded it.

The errors alleged are, the refusal of the Court to reject the two first pleas; overruling the challenge to the second array of the jury; the refusal of the Court to permit the plaintiff to prove the execution of the bond by proof of the hand-

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writing of the subscribing witness; and the exclusion of the bond from the jury.

As to the refusal to reject the pleas, we conceive the [*357] *plaintiff is precluded from urging that point as error by her own course. By replying to the first plea and joining issue on the second, after the motion to reject was overruled, the plaintiff abandoned the motion. Had there been a demurrer to the pleas, and it had been overruled, it is well settled that by answering the pleas the plaintiff would have waived the demurrer. The issues of fact would have overridden it. The effect must be the same in respect of a motion to reject a plea.

Nor is there any force in the objection to the legality of the jury summoned by the elisor. The Circuit Court had a discretionary power to appoint that officer, the sheriff being one of the defendants, and there being (as must be presumed) no coroner in attendance. R. S., 1843, p. 651. That the person appointed as elisor had served as bailiff to the jury in other causes, did not disqualify him. In the capacity of elisor he was an officer of the Court, and derived no authority from the sheriff. There could be no objection to his summoning the jury.

The plaintiff had a right, in proving that the subscribing witness to the bond in question was without the jurisdiction of the State, to prove his handwriting. *Ungles v. Graves*, 2 Blackf., 191; *Bowser v. Warren*, 4 Id., 522. We do not conceive this right was affected by the fact that the defendants had followed the witness out of the State and taken his deposition; and if the plaintiff had rested her cause upon the rejection of her testimony, an error would have been committed of which she could rightfully complain. But by resorting to the deposition of the subscribing witness taken by the defendants, the plaintiff made that testimony her own, and had no longer any pretence for resorting to secondary evidence to prove the execution of the bond. The adoption of that testimony was an abandonment of the right to prove the handwriting of the subscribing witness—as much so as if the plaintiff had produced

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the witness personally in Court. The rejection of the secondary evidence, therefore, can be no cause for reversing the judgment.

But we think that the exclusion of the bond from the jury was an error which must produce a reversal. The question whether the instrument in controversy was an escrow or the deed of the defendants, was one of the issues formed [*358] by the *pleading, and was a matter for the jury to decide; and to enable them to decide, it was necessary that the bond and all the evidence in the cause should have been submitted to them. *Murray v. The Earl of Stair*, 2 B. & C., 82; 2 Phill. Ev., 145. There was also another question raised by the pleadings which was a matter for the jury; and that was whether, provided the instrument in its original form was delivered by the defendants as their deed, the striking out of the name of *Brier* was such an alteration as to destroy its identity, and make it no longer their deed. 2 Stark. Ev., part 4, p. 479; Bull. N. P., 171. To enable the jury to decide that matter, it was necessary that the bond should have been before them.

Per' Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler, for the plaintiff.

R. C. Gregory, for the defendants.

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BURGER.

CONSTABLE'S BOND.—A constable's bond, though not executed until after he had commenced the discharge of his duties, may be sued on for any breach of the condition committed subsequently to its execution.

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State, on the relation of *Burger*, against a constable and his

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surety on their bond. The constable had been specially appointed by a justice of the peace, and the bond was conditioned for the faithful discharge of his duties. The breach assigned is that the constable, having an execution issued by a justice of the peace against the relator, levied the same on a certain horse and bridle belonging to the relator of the value of \$92; that the property so levied on was exempt from execution; that the relator requested the constable to set apart said property as exempt from execution, but the request was refused. There was a plea in denial of the breach. The defendants also pleaded that the bond sued on was not executed until after the [*359] levy on the property, and that the *bond was therefore void. General demurrer to the last mentioned plea, and the demurrer sustained. The issue on the first plea was submitted to the Court. The plaintiff having closed her testimony, the defendants offered some irrelevant matters in evidence which were correctly excluded. The Court gave judgment for the plaintiff.

The only question in the cause, except that respecting the evidence offered by the defendants, which we have already noticed, is whether or not the plea demurred to is valid. We think it is not. It is said in support of the plea, that the bond was not executed in time to be legal. This objection is not tenable. A suit on the bond may be sustained for any breach of the condition committed subsequently to its execution. The breach complained of in this case is alleged to have occurred after the bond was executed, and the defendants, for any thing shown by the plea, are liable.

Per Curiam.—The judgment is affirmed with 3 *per cent.* damages and costs.

J. Morrison, for the appellants.

C. C. Nave, for the appellee.

Stingley v. Kirkpatrick.

STINGLEY v. KIRKPATRICK.

FORMER ADJUDICATION.—Suit against *A* on a promissory note. Plea, that the note was joint and several, purporting to be executed by the defendant and *B* and *C*; that the plaintiff had previously sued the defendant and the other makers in debt on the same promises; and that the defendant and *B* had recovered in the suit a judgment for costs. *Held*, that the plea was bad.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit on a promissory note by the payee against the maker. Plea as follows: The defendant says *actio non*, because he says that the note sued on is joint and several, and purports to be executed by this defendant, one *David Patton*, and one *Samuel Bush*; that the plaintiff heretofore, to wit, at the *August* term of the Circuit Court, &c., impleaded this defendant, the said *Patton*, and the said *Bush*, in an action of debt for not performing the very same identical promises and undertakings in the declaration mentioned; and that such proceedings [*360] *were thereupon had in said Court in that plea, that afterwards, to wit, at, &c., this defendant and said *Patton*, by the judgment of said Court, recovered in the said plea against the plaintiff judgment for the costs and charges in that behalf expended, whereof the plaintiff was convicted, as appears by the record; which said judgment still remains in full force; and this the defendant is ready to verify. General demurrer to the plea and judgment for the defendant.

This plea of former recovery in favour of the defendant and *Patton*, in a suit against them and *Bush*, brought by the plaintiff on the same note on which the present suit is founded, is valid, if it shows that the merits were in issue in the first suit; that the issue was determined by the proper tribunal; and that there was a judgment that the defendant should go without day. The note being joint and several, the holder had a right to treat it as either; that is, he might sue all the makers in one suit as joint promisers, or he might sue any one or each of

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them as a separate promiser, though he could only have one satisfaction. But the holder could not sue all the makers jointly, and after a judgment on the merits either for or against him, sue either of them separately. If he could, the defendant would be liable to be harassed by two actions upon the same contract, which the law does not permit.

The plea, however, does not state the facts necessary to render it a bar. It does not show that the merits of the cause were in issue, and were tried by the proper tribunal in the former action; and that the judgment necessary to discharge the defendant from liability on the note had been rendered. All it alleges on the subject is, that the defendant and the other makers had been sued upon the same promises; and that the defendant and *Patton* had recovered in the suit a judgment for costs. The plea is, therefore, obviously defective on general demurrer. *Paine et al. v. The State*, in this Court, *May* term, 1844.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ingram and *R. Jones*, for the plaintiff.

D. Mace, for the defendant.

[*361] *REDMAN and Another v. GOULD.

TROVER.—To maintain trover, the plaintiff must show that, at the time of the conversion, he had a right of property and of possession in the goods.

BANKRUPT LAW.—After a person has been declared a bankrupt, and his goods have passed to his assignee, he has no right of property or of possession in the goods.

TRANSCRIPT OF RECORD.—The transcript of a record of the District Court of the *United States* for another State, is, if properly authenticated, admissible evidence in the Courts of this State.

APPEAL from the *Floyd* Circuit Court.

SULLIVAN, J.—Trover by *Gould* against *Redman* and *Clark*. The defendants pleaded severally not guilty. There were also

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two special pleas which were demurred to, and the demurrers sustained. No error is complained of in the judgment upon the demurrers. The general issues were tried by a jury. Verdict and judgment for the plaintiff.

During the trial the defendants offered to read to the jury the transcript of a record of the District Court of the *United States* for the District of *Missouri*, which was objected to by the plaintiff and the objection sustained. By the transcript offered in evidence, it appeared that *Gould*, the plaintiff in the suit, had been declared a bankrupt on the 13th day of *June*, 1842, by the District Court of *Missouri*, and that one *V. M. Gaseche* was, on the same day, duly appointed his assignee. The transcript was under the seal of the Court, attested by the clerk, and accompanied by a certificate of the district judge that the attestation was in due form.

It was proved by the plaintiff that, in the month of *June*, 1842, the defendant, *Clark*, took from the house in which the plaintiff's wife and two children were residing, during [*362] the *absence of the plaintiff, the goods and chattels named in the declaration, and sold them. There was testimony also which, in the opinion of the jury, connected *Redman* with the conversion proved upon *Clark*. At this stage of the cause it was competent for the defendants to prove that the property mentioned in the declaration had been transferred to, and had been taken possession of by, the plaintiff's assignee. In an action of trover the plaintiff, to maintain his suit, must have a right of property in the goods converted, as well as the right of possession, at the time of conversion. If the plaintiff had been declared a bankrupt at the time of the conversion, and the property, for the conversion of which the suit is brought, had passed into the hands of his assignee, it is manifest that the plaintiff had neither a right of property nor of possession. To prove those facts, the defendants offered the record from the District Court of *Missouri* as a part of their evidence. What other proof they intended to adduce we do not know. It may be they were prepared to prove facts entirely inconsistent with the plaintiff's right of property or

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of possession. In the chain of evidence, the record was a necessary link, and the Court erred in rejecting it. In *Adams v. Lisher*, 3 Blackf., 241, it was decided, that the transcript of a record from a District Court of the *United States* was admissible as evidence in the Courts of this State.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Collins, W. Quarles, and J. H. Bradley, for the appellants.

R. Crawford, for the appellee.

SHERMAN v. WILSON, in Error.

IF the declaration in assumpsit contain a count on a promissory note, and a common count, and the defendant appear to the suit and suffer judgment by *nil dicit*, the Court can not assess the damages without the consent of parties.

[*263] *THE STATE BANK v. WYMOND and Another.

GIVING TIME TO DRAWER OF BILL OF EXCHANGE.—If the indorsee of a bill of exchange give time to the drawer, for a valuable consideration, he thereby discharges the indorser.

APPEAL from the *Dearborn Circuit Court*.

DEWEY, J.—Assumpsit by the State Bank, as the indorsee, against *Wymond and Faris*, as the indorsers, of a bill of exchange. The bill, which is dated *December, 2d, 1841*, was drawn by *Isaac Durn* on *N. N. John*, at *New Orleans*, in favour of the defendants, for \$4,500, at four months. Plea, the general issue. Cause submitted to the Court. Judgment for the defendants.

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The plaintiff having made out a *prima facie* case, in which it appeared that the bill was drawn and indorsed for the benefit of the drawee, the defendants proved the following facts: On the 25th of *September*, 1842, the plaintiff entered into an agreement with *Dunn*, the drawer, by which it was stipulated that *Dunn* should give a *cognovit* for a judgment on the bill in favour of the plaintiff, at the then next term of the *Dearborn* Circuit Court; that he should deliver to the bank, and place under its control, certain mortgages, as collateral security; that there should be a stay of execution on the judgment confessed for eighteen months; and that a suit in favour of the bank against *Dunn* on the bill, then pending in the *Marion* Circuit Court, should be dismissed. In pursuance of the agreement, the mortgages were delivered to the bank. the *cognovit* given, the judgment confessed at the *October* term of the *Dearborn* Circuit Court, 1842, and a stay of execution for eighteen months entered of record. The mortgages were executed by *E. D. John* to *N. N. John*, and assigned by the latter to *Dunn*. The object of the mortgages was to secure the drawer and indorsers of the bill against loss. The defendants had no knowledge of the mortgages, nor of the arrangement between the plaintiff and *Dunn*.

The counsel for the bank contends that, inasmuch as the collateral security afforded by the mortgages was advantageous to the defendants, the giving time by the plaintiff to the drawer did not discharge them.

This is not, however, as we conceive, putting the cause on the true ground. The relief which, in some instances, [*364] is *extended to sureties in Courts of law, in consequence of giving time to the principle, is a doctrine borrowed from a rule in equity. The rule is this, that the surety has the right, so soon as the debt for which he is bound becomes payable, to require the creditor to enforce his legal remedy, or to pay the money himself and resort immediately to the principal for reimbursement. Whatever impairs this right discharges the surety. A creditor, by suspending his rightful power to coerce the principal, undertakes

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that he will not, during the suspension, receive the money from the surety; for should he receive it from him, the surety would be entitled to take his recourse immediately against the principal, who would consequently lose the benefit of the further time given him by the creditor; this, if the principal has given a consideration for the delay, would be unjust to him. On the other hand, it would be equally wrong to compel the surety to submit to the delay, and run the hazard, in the mean time, of an unfavourable change in the circumstances of the principal.

This equitable doctrine has been applied by Courts of law to actions founded on bills of exchange. *English v. Darley*, 3 Esp., 49, and 2 B. & P., 61, was assumpsit by the indorsee against the indorser of a bill of exchange. The plaintiff had obtained judgment and sued out execution against the acceptor; he compromised the matter by receiving from the acceptor part of the debt, and taking a new security for the remainder payable by installments, and by withdrawing the execution. It was held that the indorser was discharged, on the ground that the holder of the bill had given time to the acceptor. *Gould et al. v. Robson et al.*, 8 East, 576, was also an action by the indorsees against the indorsers of a bill of exchange. At the maturity of the bill, the holders made an arrangement with the acceptor, by which they agreed to receive from him a portion of the money due, and for the residue to draw on him at a short future period. This was done, and the new bill accepted, the holders agreeing to retain the first bill until the other was payable, as a security. The second bill not having been paid at maturity, suit was brought upon the first. It was argued that the indorsers were benefited by that part of the transaction by which a part of the debt was paid, and could not, therefore, with propriety complain of the postponement of the time for the payment of the [*365] *remainder. But the Court decided otherwise, and held that the giving of time for a part of the debt discharged the indorsers.

In the foregoing cases the acceptor was considered as the

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principal, and the parties to the bill, subsequently liable, as the sureties. But the equitable rule above stated is, in general, equally applicable to all cases founded on bills of exchange, where the holder has given time to any of the parties to the instrument who would be liable to any other party, upon such other party's taking up the bill. The effect of giving time is to discharge the party having the right of recourse. Story on Bills, 501. The case of the *Bank of the United States v. Hatch*, 6 Pet., 250, was an action by the indorsee against the indorser of a bill of exchange. It appeared that the bank had previously commenced an action against the drawer, which stood for trial at a certain term of the C. C. of the *United States* for the district of *Ohio*; and that the bank agreed with the drawer, for a valuable consideration, to continue the cause for judgment until the next succeeding term, which was accordingly done. It was held that the indorser was discharged. See, also, *Hall v. Cole*, 4 Ad. & Ell., 577; 6 Nev. & Mann., 124; *English v. Darley*, *supra*, per Lord Eldon. The rule, probably, does not apply to a case in which the holder of a bill having given time to a mere accommodation party, afterwards seeks to recover the debt from the party for whose benefit the bill was drawn, indorsed, or accepted. Story on Bills, 501; *Lambert v. Sandford*, 2 Blackf., 137. But this exception to the rule can not avail the present plaintiff. The bill of exchange in question was not drawn or indorsed for the benefit of the defendants, but for the use and accommodation of the acceptor; and the defendants have been affected by the time given to the drawer, precisely as they would have been had the bill been drawn and transferred in the regular course of a business transaction.

It should be remarked that when the time of payment is agreed by the holder of a bill to be postponed, the agreement, to operate as a discharge of a party otherwise liable, must be made without the consent of that party, and be founded upon a good and valuable consideration. A mere voluntary delay in suing any of the parties to a bill does not exonerate any other party. *Philpot v. Briant*, 4 Bing., 717; *Clarke v.*

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[*366] **Devlin*, 3 B. & P., 363. Nor does the taking collateral security have that effect. *Pring v. Clarkson*, 1 B. & C., 14; *Bedford v. Deakin*, 2 Stark., 178.

In the cause under consideration, the agreement of the plaintiff to give a stay of execution of eighteen months on the judgment confessed by the drawer of the bill, was not only founded on a valid consideration—the delivery of the mortgages as collateral security,—but it was actually carried into effect by an entry of record; and it was made without the knowledge or consent of the defendants. Thus, the plaintiff was effectually prevented from collecting the debt from the drawer until the lapse of a year and a half. It can make no difference as to the rights of the parties, whether the time given was in the form of a stay of execution, or by an agreement not to sue. The result was the same; the defendants were deprived of their right to have the plaintiff collect the money from the drawer without delay, or of paying it themselves and taking their remedy immediately against him. This is the injury of which they complain; and it is no answer to their complaint to tell them that the collateral security taken by the plaintiff was designed for, and might inure to, their benefit; the plaintiff had no right to deprive them of a privilege given them by the law, and to substitute for it something else, which, in the opinion of the plaintiff, might be equally advantageous. Of that matter the defendants had a right to judge for themselves; and having been deprived of that right by the unauthorized act of the plaintiff, they stand discharged from all liability to the bank on the bill of exchange on which this suit is founded.

We think the decision of the Circuit Court is clearly right.

Per Curiam.—The judgment is affirmed with costs.

A. Lane, for the appellant.

J. Ryman and *P. L. Spooner*, for the appellees.

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[*367] *DUMONT v. POPE and Another

BILL OF EXCHANGE—PRESENTMENT.—To authorize the payee to recover against the drawer of a bill of exchange in which no time for payment is specified, he must present the bill to the drawee for acceptance or payment within a reasonable time after it is received.^(a)

SAME—PROTEST.—A statement in a protest of such bill for non-acceptance, that the reason given by the drawee for non-acceptance was that he had no effects of the drawer, is no evidence of the want of effects.

SAME—CONSIDERATION.—If an order, drawn by *A* upon *B*, be not a bill of exchange, there can be no recovery by the payee against the drawer without proof of consideration.

ERROR to the *Cass* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Pope* and another, partners, &c., against *Dumont*. The declaration contains four counts.

The first count states that on the 28th of *October*, 1842, at *Logansport*, the defendant made his instrument of writing, commonly called an order, and thereby requested certain persons using the name and style of *Pendleton* and *Zern*, of *Peru*, to pay the plaintiffs or order, in conformity to a certain agreement between them and the defendant, bearing date the 17th of *September*, 1842, the sum of \$200, and then and there delivered said writing to the plaintiffs; that afterwards, viz., on the 29th of *November*, 1842, at *Peru*, the said order was presented to said *Pendleton* and *Zern* for acceptance, but that they refused to accept or pay, &c., of which the defendant, on the day and year last aforesaid, at, &c., had notice. By means whereof the defendant became liable, &c., and though often requested, &c., has not paid, &c.”

The second count, except that it sets out the instrument of writing *in hæc verba*, is the same with the first. The instrument is as follows: “*Logansport, Ind., October 28, 1842. \$200. Messrs. Pendleton and Zern will please pay in conformity to the agreement between us, bearing date 17 September,*

(a) See *Blankenship v. Rogers*, 10 Ind., 337; 8 Id., 139.

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1842, to Messrs. *W. H. Pope* and Co., or order, the sum of \$200, holding the balance of the funds deposited with you, if any, at my disposal and subject to my further order. *Julius W. Dumont*, surviving partner, &c."

The third count is for goods sold and delivered; and the fourth for money lent and for money paid.

Plea, the general issue.

[*368] *On the trial, the plaintiffs offered in evidence the instrument of writing described in the special counts, together with the protest of a notary for non-acceptance of the same. The protest alleges the presentment and refusal to accept to have been on the 29th of *November*, 1842, and that the reason given by the drawees for the non-acceptance was, that they had no effects of the drawer in their hands. A witness, *Patterson*, stated that shortly after the making of the order, he wrote to a friend to ascertain if the drawees would accept it, and was informed that they would not. He also stated that soon after he received said protest, he notified the defendant of it, but that the defendant paid no attention to the notice. The defendant proved that the distance from *Peru* to *Logansport* is eighteen miles, and that a mail goes from one of those places to the other three times a week. This was all the evidence given in the cause.

Verdict for the plaintiffs for \$200. Motion for a new trial overruled, and judgment on the verdict.

The question presented by this cause is, does the evidence support the verdict?

It is not necessary to determine whether the instrument of writing given in evidence is a bill of exchange or not. If it is a bill of exchange, the verdict is evidently wrong. To authorize the payee to recover against the drawer on such bill, in which, as in this case, no time for payment is specified, he must present the bill to the drawee for acceptance or payment within a reasonable time after it is received. *Chitt. on Bills*, p. 385. The parties here lived in towns in this State only eighteen miles apart, and there was a mail which went three times a week from one town to the other. The bill was not

presented until thirty days after it was received; and the presentment was, therefore, entirely too late. *Patterson's* testimony must be laid out of the case. He does not appear to have been an attorney or agent of the plaintiffs, and what he did has no bearing on the cause. Indeed, had he been the plaintiffs' agent, he did nothing that could benefit his principals. The plaintiffs say that no presentment was necessary, the drawees having no effects of the drawer; but the want of effects was not proved. The statement on the subject in the protest is no evidence of it. Indeed, it is doubtful whether the protest of an inland bill is evidence here for any [*369] purpose. **Nicholls v. Webb*, 8 Wheat., 326. Considering the instrument, therefore, to be a bill of exchange, the plaintiffs' laches discharged the defendant from all liability on the bill, and on the consideration for which it was given.

We will next consider the case on the supposition that the instrument is not a bill of exchange. As there is no count on the special agreement averring a consideration, the plaintiffs must rely on the common counts. Supposing the plaintiffs' laches not to have discharged the drawer from liability, of which we give no opinion, still the evidence did not entitle them to recover. The instrument not being valid as a bill of exchange, it was not sufficient evidence under the money counts. The following is the language of Mr. *Chitty* on this subject: If an instrument, in other respects in the form of a bill of exchange, or promissory note, be invalid as such, as, for instance, because it was payable on a contingency, it will afford no *prima facie* evidence of having been given for *adequate consideration*, although it in terms profess to have been given for value received; nor will it be negotiable or even valid between the original parties, unless it be proved that it was founded on adequate consideration. *Chitt. on Bills*, 11. The plaintiffs should have proved the consideration for which the order was given, and if that were goods sold and delivered, money lent, or money paid, and the plaintiffs' laches relative to the order were no discharge of the defendant's liability, the verdict would

 Scott v. Williams.

be right. But there was no evidence for the plaintiffs but the order and protest, and *Patterson's* testimony; and, therefore, neither of the common counts was sustained.

For these reasons the Court ought to have granted a new trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. P. Biddle, for the plaintiff.

W. Wright, for the defendants.

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*SCOTT v. WILLIAMS.

JUSTICE'S TRANSCRIPT—PRACTICE.—*Scire facias* to have execution on a justice's transcript. *Held*, that the question whether there was a transcript of the justice's judgment duly filed in the clerk's office, was for the Court to decide; the transcript, if filed, being a record of the Circuit Court.

SAME—PLEADING.—To a plea in such case, denying that there was a record of the justice's judgment in his Court, the replication should be that there was such a record in the justice's Court.

ERROR to the *Miami* Circuit Court.

BLACKFORD, J.—*Scire facias* to have execution on the transcript of a judgment of a justice of the peace filed in the Circuit Court. The writ avers that the plaintiff recovered a judgment before the justice, &c.; that a *feri facias* issued thereon, and was returned *nulla bona*; that a certified transcript of the judgment and proceedings was filed in the clerk's office, &c.

There are two pleas: 1, There is no record of the supposed recovery in the *scire facias* mentioned duly filed in the clerk's office, &c., as alleged, &c., and this the defendant is ready to verify; wherefore, he prays judgment. 2, There is no record of the judgment in the *scire facias* mentioned, as alleged, &c., and this the defendant is ready to verify; wherefore, he prays judgment.

Replication to the first plea that there is such a record of

the recovery mentioned in the *scire facias* duly filed, &c., as alleged, &c., and this the plaintiff is ready to verify by the record, &c. Replication to the second plea that there is such a record of the judgment remaining in the office of the clerk of the Circuit Court as the plaintiff has alleged, and this he is ready to verify by the record remaining in said Court.

General demurrer to the replication to the second plea, and joinder.

The demurrer was overruled, and final judgment rendered for the plaintiff.

The defendant contends that the issue on the first plea should have been to the country, and have been tried by a jury. We think otherwise. The first plea to be valid must be considered as meaning that there was no transcript of the judgment of the justice, mentioned in the *scire facias*, duly filed, &c. And the replication to that plea must be [*371] *understood as averring that there was such a transcript duly filed, &c. Whether there was a transcript of the justice's judgment duly filed in the clerk's office, was a question to be decided by the Court; for the transcript, if filed, was a record of the Circuit Court.

It is also contended, that the demurrer to the replication to the second plea should have been sustained, and we are of that opinion. The second plea is a denial that there was a record of the justice's judgment remaining in his Court. The replication to that plea, therefore, should have been, not that there was a record of the judgment remaining in the clerk's office of the Circuit Court, but that there was such a record in the justice's Court.

Per Curiam. The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

W. Wright, for the defendant.

BERRY and Others v. McDONALD.

AMENDMENT.—A *scire facias* on a justice's transcript, &c., may be amended before plea by striking out an immaterial averment.

PRACTICE.—The Court may permit the plaintiff to withdraw a demurrer to a plea, and reply to it, after the giving of an opinion against the plea, but before judgment rendered on the demurrer.(a)

EVIDENCE OF TITLE TO LAND.—*Scire facias* on a justice's transcript to have execution against land, the judgment debtor, who was the patentee, being dead. Held, that evidence that the land was subject to a trust, or to a pre-emption right, was inadmissible.

ERROR to the Daviess Circuit Court.

SULLIVAN, J.—*Scire facias* against the heirs and tenant of William C. Berry, deceased, to have execution against the real estate of the deceased on a judgment rendered against him by a justice of the peace. The writ, in addition to the usual averments of a judgment, an execution, and return of *nulla bona*, states the death of the judgment debtor; that he died intestate, and without leaving any goods or chattels out of which said judgment or any part thereof could be collected; that he was wholly destitute of personal property, so that administration thereon would have been useless, &c., and for that reason had never been granted, &c.

[*372] Two of the defendants were infants. They appeared by their guardian and pleaded, 1, *Nul tiel record*. 2, No such judgment and proceedings as those set forth in the *scire facias*, were filed in the clerk's office of the Daviess Circuit Court and recorded upon the order book thereof as stated, &c. 3, No *fieri facias* had issued on said judgment as alleged. 4, That said decedent was not the owner in fee-simple of the land described in the *scire facias*. The remaining defendants pleaded three pleas, the same substantially as the first, third, and fourth, pleaded on behalf of the infant defendants. Replications controverting the pleas were filed; and on the trial of the cause by the Court, judgment that execution go, &c., was rendered.

(a) *Dunn v. Shanks*, 7 Ind., 490.

Berry and Others v. McDonald.

At the *October* term, 1843, and before the defendants pleaded, the Court permitted the plaintiff to amend the *scire facias*, and that is the first error complained of. The writ was amended by striking out of it an averment, that the plaintiff had made known to *Warner*, the justice by whom the judgment was rendered, that *Berry*, the judgment debtor, had lands in *Daviess* county. There was nothing in the amendment of which the defendants have a right to complain. The averment was unnecessary, *Wiley v. Logan*, 5 Blackf., 11, and the amendment immaterial.

There was, also, an exception taken to the opinion of the Court, permitting the plaintiff to withdraw a demurrer to the fourth plea of the infant defendants and reply, after the Court had expressed an opinion that the plea was insufficient, but before any judgment had been rendered upon the demurrer. This was a matter entirely within the discretion of the Court, to be guided by the demands of justice and the circumstances of the case. We see no good reason why, even at a subsequent term, or at any time before trial, the Court, if it should doubt its judgment sustaining a demurrer, should not permit a party to withdraw it and plead to the merits.

The point, however, on which the reversal of the judgment in this case is most strongly urged, is the refusal of the Court to admit certain evidence offered by the defendants, to prove that *William C. Berry* was not the owner of the real estate mentioned in the *scire facias*. The defendants offered to prove, that the land mentioned had been fraudulently entered or purchased by *William C. Berry* from the U. S. in his own name, but paid for with the money of another person, [*373] *and that *Berry* never had possession of the land; that *Beverly Berry* was in possession of the land under a pre-emption right before it was purchased by *William C. Berry*, and had continued in possession of it ever since claiming it as his own; and that *William C. Berry* had admitted that he had no title to the land. The Court rejected the evidence offered, and permitted the plaintiff to prove, by documentary evidence, that *William C. Berry* was the patentee

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of the land. It is very manifest, that the conflicting claims to the land described in the writ can not be settled in this suit. The unnamed person with whose money, it is said, *William C. Berry* entered the land, may set up a resulting trust, or he may waive it and demand his money. He is yet to speak as to the course he will pursue. The right of a pre-emptioner to claim the legal title to land, for which another has obtained a patent without fraud as to him, may well be questioned. Those rights, conflicting and complex as they are, can not be determined in this collateral way. *William C. Berry* was the patentee of the land, and the legal title, according to the evidence before us, is in his heirs. The Court, therefore, did not err in rejecting the evidence offered.

Per Curiam.—The judgment is affirmed with costs.

J. S. Watts, for the plaintiffs.

C. P. Hester and *H. P. Thornton*, for the defendant.

CRABS v. FETICK, in Error.

IN trespass *quare clausum fregit*, a license can not be given in evidence under the general issue. It should be specially pleaded. *Bennett v. Allcott*, 2 T. R., 166. (19 Ind., 10.)

HURST, Executor, v. HENSLEY and Others.

VENDOR AND PURCHASER—CONVEYANCE BY HEIRS.—The executor of a vendor of real estate (the vendor having died without making a deed, and before he was bound to convey) has the right, in a Court of equity, to require the heirs or devisees of the vendor to execute a deed according to the contract of sale, and to demand of the vendee payment of the

[*374] *purchase-money; and he is also entitled to enforce the vendor's lien for the price of the land.(a)

(a) *Mather v. Sherwood*, 8 Ind., 92.

Hurst, Executor, v. Hensley and Others.

ERROR to the *Clark* Circuit Court.

DEWEY, J.—On the 16th day of *April*, 1838, *Fischli* entered into a written contract with *Hensley*, by which the former agreed to sell to the latter a certain lot of land in *Jeffersonville* for \$1,200 payable in two years. *Fischli* was to make a deed in fee-simple, with general warranty, to *Hensley*, upon the payment of the purchase-money. *Hensley* executed his note for the money, and took possession of the lot. Before the expiration of the two years *Fischli* died without having made a deed, the purchase-money remaining unpaid. *Fischli* left a will, by which he devised all his real estate to his nephews and nieces, and their representatives, who were his heirs at law. These devisees and heirs refused to make a deed to *Hensley*, and the latter refused to pay the purchase-money to *Fischli's* executor. Whereupon the executor, after the money became due, filed this bill in equity against *Hensley*, and the devisees and heirs at law of *Fischli*, setting forth the above facts. The prayer of the bill is, that the Court will order and decree the devisees and heirs to execute a deed to *Hensley* according to the contract; that *Hensley* pay the complainant the purchase-money; and that, in default of the making of the deed and the payment of the money, the premises be sold for the satisfaction of the debt; general relief is also prayed. *Hensley* demurred to the bill for want of equity. The demurrer was allowed, and the bill dismissed.

We think this decision is erroneous. The executor of *Fischli* can not sustain a suit at law on the note for the purchase-money, because no deed has been made, or offered to be made, to *Hensley* for the lot which *Fischli* contracted to convey to him. The payment of the purchase-money and the making of the deed being by the contract concurrent acts, no suit at law will lie for the money unless the deed has been made or offered to be made. *Warner v. Hatfield*, 4 Blackf., 392. The complainant is incompetent to make a deed himself, nor can he, without the aid of a Court, compel the devisees and heirs of *Fischli* (in whom is the legal title of the lot contracted to be sold to *Hensley*) to execute a conveyance.

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[*375] *The executor is, therefore, without remedy, unless he can resort to equity to enforce the contract. We think this resort is open to him. The personal representative of a vendor who has deceased without having conveyed, and before he was bound to convey, has the right in a Court of equity to require of the heirs or devisees of the vendor, to make a deed according to the contract of sale, and to demand of the vendee the payment of the purchase-money; and he is also entitled to enforce the vendor's lien for the price of the land. *Lacon v. Mertins*, 3 Atk., 1. Such are the objects of the bill in this cause. The demurrer should have been overruled.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

R. Crawford, for the plaintiff.

A. Lovering and *H. P. Thornton*, for the defendants.

PHIPPS and Others, Administrators, v. ADDISON and Others.

BILL OF EXCHANGE—PLEADING, FIRM NAME.—In a suit on a bill of exchange payable to a firm, brought by the drawer, who had paid the bill, against the acceptor, it is sufficient to describe the bill in the declaration as payable to the firm, without setting out the names of the members of the firm.

SAME—ADMINISTRATOR.—The declaration in a suit against the administrator of the acceptor of a bill of exchange, need not allege that the plaintiff's claim had been filed in the office of the clerk of the Probate Court.

SAME—ASSESSING DAMAGES.—If a demurrer to the declaration in such case be overruled, the Court may assess the damages so far as the amount due on the bill of exchange is concerned; but in respect to the costs of protest, if chargeable at all, there should be a jury of inquiry.^(a)

SAME—FORM OF JUDGMENT.—In such suit, the judgment, if for the plaintiff, should be for the damages and costs to be levied of the intestate's goods if the defendant have so much, and if he have not, then the costs of the defendant's own goods.

(a) *Love v. Bohan*, 4 Ind., 235.

Phipps and Others, Administrators, v. Addison and Others.

ERROR to the *Clay* Circuit Court.

DEWEY, J.—Assumpsit by the drawers against the administrators of the acceptor of a bill of exchange. The declaration contains two counts: in the first, the bill of exchange is described as having been drawn by the plaintiffs in favour of “*Wm. Garvin and Co.*,” and alleged to have been paid to them by the plaintiffs, on the failure of the acceptor to pay it; in the second count, the names of the persons composing the firm of *Wm. Garvin and Co.*, are given; in other [*376] *respects the two counts are the same. General demurrer to the declaration overruled; and judgment against the defendants, individually, for the amount of the bill of exchange, and costs of protest, together with the costs of the suit.

It is contended by the plaintiffs in error, that the first count is defective for not setting out the names of the members of the firm of *Wm. Garvin and Co.*; and that both counts are bad for not alleging that the claim, on which the action is founded, was filed in the office of the clerk of the Probate Court, whence issued the letters of administration of the defendants.

Neither objection can be sustained. As to the first, we have repeatedly decided that, in describing a negotiable instrument, it was sufficient to designate parties to it, who were not parties to the action, by the name of a firm as it appeared upon the instrument. *Stout v. Hicks*, 5 Blackf., 49; *Cooper v. Drouillard*, Id., 152. See, also, *Budd v. Wilkinson*, Id., 264. It was sufficient to describe the payees of the bill of exchange in the style of their firm. The other objection to the declaration is founded upon a statutory provision, that the creditors of deceased persons shall file, in the office of the clerk of the Probate Court of the proper county, a statement of their claims. R. S., 1838, p. 182. It is evident, however, that the object of this provision was, not to give the creditor a right of action against the administrator, or executor, but to secure a preference, in the payment of his debt, over claims of less dignity; and to protect the administrator, or executor, against the consequences of first paying debts of a lower degree. It is not

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necessary, therefore, to aver, in the declaration, the filing of the claim in the Probate office.

There are, however, two errors in the judgment of the Circuit Court.

On overruling the demurrer to the declaration, the Court assessed the damages. This was right so far as the amount due on the bill of exchange was concerned; but it was wrong in respect to the cost of protest. That was not a matter of computation, and if chargeable at all, required a jury of inquiry, or an agreement of the parties waiving it.

The judgment is against the defendants individually. It should have been, that the damages be levied of the goods and chattels of the intestate; and the costs also, provided [*377] there *were sufficient assets to pay them; if not, of the goods and chattels of the defendants.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiffs.

E. W. McGaughey, for the defendants

-ROELLA v. FOLLOW.

SLANDER.—The words, “He” (meaning the plaintiff) “took a false oath,” are not in themselves actionable.

SAME—PLEADING.—In a suit for such words, there must not only be in the declaration the requisite inducement and *colloquium*, but there must also be an *innuendo* explaining the defendant’s meaning by reference to the previous matter.(a)

SAME.—But if the words laid do, of themselves, import a crime, there is no occasion for an *innuendo* explaining their meaning.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of slander brought by the plaintiff in error. The declaration contains six counts.

The first count states that before the committing of the

(a) *Rodebaugh v. Hollingsworth*, 6 Ind., 339.

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grievances, &c., a certain complaint had been pending before a certain justice of the peace, wherein the State of *Indiana* was plaintiff, &c.; and that, on the trial, the plaintiff was sworn and gave evidence as a witness on behalf of the State; yet the defendant well knowing the premises, in a certain discourse, &c., of and concerning the plaintiff, &c., falsely and maliciously spoke of and concerning the plaintiff, and of and concerning his said evidence at said trial, the false, scandalous, malicious, and defamatory words following, that is to say, "He" (meaning the plaintiff) "took a false oath."

The second, third, and fifth counts, are similar to the first.

The fourth count alleges that in a certain other discourse, which the defendant then and there had of and concerning the plaintiff, &c., he, the defendant, then and there spoke and published of and concerning the plaintiff, &c., the false, scandalous, malicious, and defamatory words following, that is to say, "You" (meaning the plaintiff) "are a thief." The words laid in the sixth count are, "He" (the plaintiff meaning) "is a thief." *The declaration concludes by alleging general damage in the usual form.

There was a general demurrer to each of the counts; and the demurrers were sustained. Judgment for the defendant.

The first, second, third, and fifth counts are insufficient. The words here complained of are not in themselves actionable. They amount only to a charge that the plaintiff was forsworn, which is not in itself actionable. *Holt v. Scholefield*, 6 T. R., 691. These counts, it is true, contain the requisite inducement and *colloquium*, but they omit the *innuendo* which is necessary, in such cases, to explain the defendant's meaning by reference to the previous matter. There is no objection to the other counts. The words there laid do, of themselves, import a crime; and there was consequently no occasion for an *innuendo* explaining their meaning.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Wallace, for the plaintiff.

L. P. Ferry, for the defendant.

Mahan and Others v. Sherman, for Use of the Wabash, &c., Packet Boat Co.

MAHAN and Others v. SHERMAN, for the Use of the WABASH
and ERIE PACKET BOAT COMPANY.

PARTNERSHIP—NOTE MADE BY PARTNER.—Suit by *A*, for the use of a certain Packet Boat Company, against *B* and *C* on a promissory note payable to the plaintiff for the use of said company. *B* pleaded in bar that he and the plaintiff were, at the time of making the note, and still were, partners in said company; that the plaintiff held the note in trust for said company; and that the consideration of the note was certain canal-boats, &c., purchased by the defendants of the company. *Held*, that the plea was bad.

SAME.—But had the note been payable to the company, a suit on it by the company could not have been sustained; for *B* being one of the company, the same person would then have been both plaintiff and defendant.

PAROL EVIDENCE TO VARY WRITTEN CONTRACT—A verbal contract, made at the time a promissory note is executed, varying the terms of the note, can not be set up to defeat a suit on the note. (a)

PLEADING.—If a plea profess to answer the whole declaration and answer only a part, it is bad on general demurrer.

SUBMISSION OF CAUSE TO COURT.—Where a cause has been tried by the Court instead of a jury, the record should show that the cause was submitted to the Court by the parties.

[*379] *ERROR to the *Huntington* Circuit Court.

BLACKFORD, J.—Assumpsit brought by *Sherman*, for the use of the *Wabash* and *Erie Packet Boat Company*, against *Samuel Mahan*, *Francis Compact*, and *Lewis G. Thompson*. The first count is on a promissory note executed by the defendants, and payable to the plaintiff and one *Stephen Cole*, since deceased, for the use of the *Wabash* and *Erie Packet Boat Company*. The note was for the sum of \$2,619, was dated on the 25th of *February*, 1841, and payable on the 1st of *December*, 1843. The second count is for money had and received.

Thompson, on whom the process had been duly served, did not appear, and judgment by default was rendered against him.

Mahan pleaded the general issue and the following special pleas: 1, *Actio non*, because, he says, that he and the plaintiff

(a) *State v. Overturf*, 16 Ind., 261; 8 Id., 417; 2 Id., 477.

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were, at the time of making the note, and still are, partners in said company; that *Sherman* holds the note in trust for said company; and that the consideration of the note was certain canal boats, &c., purchased by the defendants of said company. 2, *Actio non*, because, he says, that at the time the note was given, it was agreed by this defendant, the said company, and the plaintiff, who was a partner of said company, that an account for work, &c., which this defendant held against said company, amounting to \$3,000, should, before the note became due, be adjusted by this defendant and said company, and the amount due this defendant thereon be applied in part or full payment of the note; that it was further agreed by this defendant and said company that suit should not be brought on said note till after said settlement; and that this defendant, on, &c., in 1841, requested said company and the plaintiff to make said settlement, but they refused, &c. General demurrers to these special pleas, and judgment for the plaintiff.

The defendant *Compart* pleaded as follows: *Actio non*, because, he says, that at the time the note was made, the said company, and the plaintiff as a partner thereof, were indebted to said *Mahan* for work, &c., done for said company; that it was then agreed by *Mahan* and said company that they would ascertain the amount of said indebtedness before the note fell due, and that the same, when ascertained, [*380] should be applied by said company as a payment or in discharge of the note; that the company, on such settlement, would have owed *Mahan*, and do owe him, \$3,000; that on the faith of said agreement, this defendant executed the note; that defendant has released to *Mahan* all his, defendant's, interest in the goods which the defendants purchased of said company, and for which the note was given; that *Mahan*, in consideration thereof, agreed to indemnify this defendant against the payment of the note; that the company have refused to make said settlement; and that the plaintiff and the company and *Mahan* have combined to defraud this defendant, &c. General demurrer to this plea, and judgment for the plaintiff.

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The record states that a jury in this behalf being waived, the cause was submitted to the Court for trial of the issue in fact, and for the assessment of damages. The Court gave final judgment for the plaintiff.

The first special plea of *Mahan* is bad. It must be presumed, the plea not showing the contrary, that the note was made to the plaintiff at the request of the company, from whom the goods were bought, and for which the note was given. Had the note been payable to the company, a suit on it by the company could not have been sustained; for said defendant being one of the company, the same person would then have been both plaintiff and defendant; but as the note is payable not to the company, but to *Sherman*, that doctrine does not apply. *Mainwaring et al. v. Newman*, 2 Bos. & Pull., 120; *Bosanquet et al. v. Wray et al.*, 6 Taunt., 597; Cary on Part., 92; Collyer on Part., 383. That the note was expressed to be for the use of the company is not material, the legal title to it being in the plaintiff.

The second special plea of *Mahan* and the plea of *Compart* can not be sustained. They set up a verbal contract, *made at the time the note was executed*, varying the terms of the note. The note is for the payment of a certain sum on a specified day. A verbal contract, contemporaneous with the note, is relied on to show that the note was not to be paid till a certain account should be adjusted, and the amount credited on the note. That would be making the promise conditional, which, upon its face, is absolute.

In a suit against the acceptor of a bill of exchange, [*381] the *defendant was not permitted to prove that the bill was given under a verbal understanding, that the plaintiff was not to demand payment of it, if he could reimburse himself out of other funds. The chief justice in that case says: "There is in this case no condition apparent on the face of the bill; and no rule of law is better established, than that a party shall not be permitted to add a verbal or oral condition, in order to control the legal effect of a written instrument. In an action on a bill or note, the defendant is

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not allowed to give evidence that the bill or note should be renewed, or that payment should not be demanded when the instrument becomes due; for there would be no use in reducing an agreement to writing, if it is thus to be varied by a parol understanding." *Campbell v. Hodgson*, 1 Gow., 74. So, where a note was, on its face, payable on demand, it was held that oral evidence of an agreement, entered into when the note was made, that it should not be payable until a given event happened, was not admissible. *Moseley v. Hanford*, 10 Barn. & Cress., 729. So, it is decided, that, in a suit by the payee against the maker of a note, the defendant can not prove that when the note was given there was a parol agreement that, on his giving a deed of certain real estate, the note should be given up. *Spring v. Lorett*, 11 Pick., 417. The principle of these cases is, and it applies to the one before us, that a verbal condition, inconsistent with the bill or note, can not be engrafted upon it.

But there is another fatal defect in all the special pleas. They profess to answer the whole declaration, but none of them attempts to do more than answer the count on the note.

The demurrers to the special pleas were, therefore, correctly sustained. There is an error, however, relative to the finding of the Court. One of the counts is for money had and received; one of the defendants pleaded the general issued; and another defendant, *Thompson*, does not appear to have assented to the submission of the cause to the Court, instead of a jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *J. G. Walpole*, for the plaintiffs.

W. H. Coombs, for the defendant.

[*382] *JOYCE and Another v. HUFFORD and Another.

EXECUTOR—SETTING ASIDE EXECUTION AGAINST REAL ESTATE.—After a judgment had been obtained in the Probate Court against an administrator, and an execution awarded and issued against the real estate of the deceased, the administrator filed a complaint, under the statute, for the purpose of settling the estate as insolvent. *Held*, that, on motion of the administrator, the execution should be set aside. *Held*, also, that the lien of the judgment was destroyed by the filing of the complaint.

ERROR to the *Hendricks* Probate Court.

SULLIVAN, J.—At the *May* term, 1841, of the *Hendricks* Probate Court, the plaintiffs obtained a judgment against the defendants as the administrators of one *Enoch Barlow*, deceased, upon which an execution of *fiery facias* was issued, and was returned *nulla bona*. A *scire facias* was then issued against the heirs and terre-tenants, requiring them to appear and show cause why execution should not go against the real estate of the deceased. At the *November* term, 1841, judgment was rendered, and soon thereafter an execution was issued commanding the sheriff to sell the real estate. At the *February* term, 1842, the administrators filed their petition, accompanied by the necessary schedule and inventory, setting forth that the estate was insolvent, and praying for relief, &c. At a subsequent term of the Court, a motion was made by the defendant to set aside and recall the execution that had issued on the judgment rendered at the *November* term, 1841, which motion was sustained by the Court and the plaintiffs excepted.

[*383] *The Probate act of 1838, under which these proceedings were had, section 34, provides that whenever any executor or administrator shall discover that the real and personal property of any decedent, which is or may be made assets in his hands, will not pay the demands outstanding against the estate, he shall proceed to make such real estate assets for the payment of said demands by instituting proceedings for that purpose, and shall also forthwith file his complaint

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setting forth the condition of the estate, &c., and praying generally for relief; whereupon the Court shall cause a notice of the pendency of said complaint to be published, and, from the date of the filing of the complaint, no suit or action shall be brought or sustained against such executor or administrator, unless waste, negligence, or fraud, in the discharge of his trust, be alleged against such executor or administrator; and any execution that may have issued out of the Probate Court against such executor or administrator, to be levied of the estate of the decedent in the hands of such executor or administrator, shall be recalled, &c. In *Remy v. Butler*, November term, 1843, this Court decided that a suit pending against an administrator on a promise made by the intestate, no waste negligence, or fraud being alleged against the administrator, abated by the filing of the administrator's complaint for the purpose of settling the estate as insolvent. The question now to be considered is, whether an execution issued on a judgment against the heirs and terre-tenants of the deceased to sell the real estate, is embraced by the statute, or whether it is to be confined in its interpretation to executions on judgments against the executor or administrator only. We are of opinion, that the statute is intended to embrace any judgment or execution that may reach the personal or real estate of the decedent, that may be made assets in the hands of the executor or administrator for the payment of debts. When the property of a decedent, real and personal, is insufficient to pay his debts, the statute contemplates a fair and equal distribution among his creditors, and if the construction that is contended for should be given to the statute, that object would be defeated.

The judgment of the Probate Court is said to be erroneous also, because it divests the lien which the plaintiffs acquired by their judgment on the real estate. Judgment-liens
 [*384] are *matters of statutory regulation, and where, from the spirit of the statute, it is manifest that, under certain circumstances, no lien is intended, none exists. We understand the statute that governs this case, where proceed-

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ings are had in conformity to its provisions, to destroy the lien which the judgment-creditor, under other circumstances, might have acquired.

We think it proper to remark, that this case does not involve the question whether a lien on the real estate of the deceased, created by a judgment against him in his lifetime, is divested by the filing a petition by an administrator to settle the estate as insolvent. Upon that question no opinion is intended to be expressed.

Per Curiam.—The judgment is affirmed, with costs.

C. C. Nave, for the plaintiffs.

E. W. McGaughey, for the defendants.

BERRY v. BORDEN.

ASSAULT AND BATTERY—PLEADING.—If a declaration in trespass contain two counts alleging different assaults and batteries, and the defendant's plea justify only one of the trespasses, the plaintiff, by replying *de injuria*, waives the benefit of one of the counts, and can not give evidence of an assault and battery different from the one justified.

PRACTICE.—A judgment *non obstante veredicto* is allowed only where the plea confesses the action, and entirely fails to avoid it.

ERROR to the Allen Circuit Court.

DEWEY, J.—Trespass, assault and battery. The declaration contains two counts alleging different assaults and batteries on the same day. Plea, “as to the assaulting, beating, &c., in the declaration mentioned,” *son assault demesne*, justifying a single assault and battery, and alleging that the injury done to the plaintiff, in the necessary self-defense of the defendant, “was the supposed trespasses mentioned in the introductory part of the plea, and whereof the plaintiff complained.” Replication, *de injuria*; and issue. On the trial, the defendant established his justification by proof. The plaintiff then offered testimony of an assault and battery different from that justified. The Court rejected the testimony, and there was a verdict for the

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defendant. The plaintiff prayed a judgment *non ob-*
 [*385] *stante veredicto*, which was *refused. Final judgment
 for the defendant upon the verdict.

The plaintiff might, undoubtedly, have compelled the defendant to plead separately to each count, by demurring to the plea; but by replying *de injuria* he waived the benefit of one of the counts, and confined the trial to the single trespass justified by the plea. 1 Chitt. Pl., 414; *Gale v. Dalrymple*, and *Gibson v. Hawkey*, Ryan & Mood., 118. The Court committed no error in rejecting evidence of a second assault and battery.

The motion for a judgment notwithstanding the verdict, was also correctly overruled. Such judgments are allowed only when the plea confesses a cause of action, and entirely fails to avoid it upon the merits. 1 Chitt. Pl., 556, 557; Steph. Pl., 97. In the present cause, the trial was restricted by the pleading to the single trespass justified by the plea, which set forth a good defense,—*son assault demesne*. The merits, therefore, were fully tried, and the defendant was entitled to judgment upon the verdict.

Per Curiam.—The judgment is affirmed with costs.

H. Cooper, for the plaintiff.

W. H. Coombs and *M. G. Bright*, for the defendant.

 McKINNEY v. HARTER.

DUE BILL—PLEADING.—Declaration in assumpsit by *Joseph Harter*, alleging that the defendant made his promissory note, commonly called a due bill, by which he acknowledged himself indebted to the plaintiff by the name of "The estate of *Thos. Eager*, deceased," the plaintiff being the administrator of said estate, in the sum of, &c.; and then and there delivered the same to the plaintiff. *Held*, that the declaration was good; and that a writing agreeing with that described in the declaration, was admissible evidence for the plaintiff.

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AMENDMENT—CONTINUANCE.—An amendment of the declaration not affecting the merits, and which could not prejudice the defendant in his defense, is no cause for a continuance.(a)

APPEAL from the *Decatur* Circuit Court.

BLACKFORD, J.—Assumpsit brought by *Joseph Harter* on a promissory note. The declaration alleges that the defendant made his promissory note, commonly called a due-bill, by which he acknowledged himself indebted to the plaintiff, by the name and description of "The estate of *Thos. Eager*, *deceased," the plaintiff being the administrator of said estate, in the sum of, &c.; and then and there delivered the same to the plaintiff; by means whereof, &c. Plea, non assumpsit. The declaration as originally filed contained the name of *Thos. Edgar*, and not that of *Thos. Eager*. After issue joined, and before the trial, the plaintiff, by leave of the Court, amended the declaration by inserting the name of *Thos. Eager* instead of that of *Thos. Edgar*. In consequence of that amendment, the defendant moved for a continuance of the cause; but the motion was overruled. On the trial, the plaintiff offered in evidence the following writing: "\$136.50. For value received, due to the estate of *Thos. Eager*, deceased, \$136.50; as witness my hand, 10th of *July*, 1838. *W. A. McKinney*." The evidence was objected to, but was admitted. The cause was submitted to the Court, and judgment rendered for the plaintiff.

There was no error in refusing the continuance. The amendment did not affect the merits of the cause, nor could it have prejudiced the defendant in his defense. Such an amendment, made during the trial, would not have been a cause of continuance; R. S., 1843, p. 715; nor ought it to be so, when made at an earlier period.

It is contended that the due-bill offered in evidence was inadmissible, but we think otherwise. The instrument is an acknowledgment on its face by the defendant, that a certain sum was due from him to "The estate of *Thos Eager*, de-

(a) *Taylor v. Jones*, 1 Ind., 17.

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ceased;" and the declaration alleges that the defendant, by the writing, acknowledged himself indebted to the plaintiff by the name and description of "The estate of *Thos. Eager*, deceased," the plaintiff being the administrator of said estate, in the sum of, &c. That allegation amounts to an averment, that the defendant made the due-bill to the plaintiff by the name mentioned in it. The instrument offered in evidence agreed with its description in the declaration, and was admissible. The plaintiff, however, could not recover without other evidence besides the due-bill. It was necessary for him to prove that, by the words in the due-bill, "The estate of *Thos. Eager*, deceased," the plaintiff was the party intended. But he had a right to introduce the due-bill, previously to offering any other evidence.

[*387] *The declaration is sufficient. The following is a similar case: Debt brought by "The *New York African Society for Mutual Relief*" against *Varick* and others. The declaration stated that the defendants, by their writing obligatory, acknowledged themselves to be held and firmly bound unto the plaintiffs by the description of "The Standing Committee of the *New York African Society for Mutual Relief*," in the sum of, &c., to be paid to the plaintiffs when, &c. Breach, &c. A demurrer to this declaration was overruled. *The New York Af. Soc. for M. R. v. Varick et al.*, 13 Johns., 38. See, also, *Leopardt v. Sloan*, 5 Blackf., 278.

Per Curiam.—The judgment is affirmed with four *per cent.* damages and costs.

A. Davison, for the appellant.

J. Ryman, for the appellee.

OLMSTED and Another v. McNALL and Another.

MECHANICS' LIEN—FLOATING WHARVES.—The statute respecting the liens of mechanics and others on buildings, embraces floating wharves for receiving, storing and forwarding merchandise.

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SAME ON WATER CRAFT.—The statute giving a lien on boats and other vessels for construction, repairs, &c., applies exclusively to vessels intended for navigation.

ERROR to the *Vanderburgh* Circuit Court.

SULLIVAN, J.—The bill in this case was filed by the complainants to enforce a lien for materials furnished by them for the construction of a building erected by the defendant, *McNall*, at the wharf at *Evansville*. The bill states that the materials were furnished “for a building with perpendicular walls, and a shingled roof, to be used by the said *McNall*, at the *Evansville* landing, as a floating but stationary warehouse and forwarding and commission house, and also as a steam boat wharf, and for the sale of boat stores, and occupying a space of 100 feet along the bank of the river, which *McNall* held by lease from year to year.” The suit was commenced under the 42d chap., art. 1, part 3d, of the Rev. Stat., 1843, p. 776, regulating the liens of mechanics and others on buildings. The bill was filed and the notice required by the statute was filed and recorded within the prescribed periods. *Gilbert*, who had a lien on the building [*388] for *labour bestowed on its construction, was made a defendant. On motion of the defendants, the Court dismissed the bill.

The ground assumed in defense of the judgment of the Circuit Court is that the building is not such a one as is contemplated by the statute under which the proceedings in the cause were commenced. It is said that the lien, if one exists at all, should be enforced under the statute giving a “lien upon boats and other vessels for construction, repairs and supplies.” Rev. Stat., 1843, p. 778. The only question in the case then is whether the statute regulating the liens of mechanics and others on buildings above referred to, applies to the floating wharves so common on our rivers, used for receiving, storing and forwarding merchandise.

The statute enacts that “carpenters, joiners, &c., lumber merchants, and all others performing labour or furnishing materials, for the construction or repair of any building, shall

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and may have a lien, separately or jointly, on the building or buildings which they may have constructed or repaired, or for which they may have furnished materials of any description, to the extent of the value of any labour done or materials furnished," &c. The words of the statute are very broad, and the only doubt as to its application to the case before us arises under the 12th section of the act. That section provides that when the claims of the parties entitled to recover shall be ascertained, the Court shall render a decree for the amount of each claim against the owner of the building, and direct the house and *interest of the employer in the lot* to be sold. It is contended that the language of the statute just cited contemplates only such buildings as are erected on and permanently attached to the realty. We do not doubt but that the mind of the Legislature was primarily directed to such buildings, but we see no sufficient reason for saying that it was exclusively so. The case before us is manifestly an exception, otherwise injustice may be done. If the statute under which these proceedings were commenced does not give the complainants a lien, there is no law that does. The building, although not erected on the lot, is attached to it; and the employer had such an interest in it as might be sold on execution. The statute, being remedial, should receive such a construction as most effectually to meet

the beneficial end in view, and to prevent a failure of [*389] the remedy. *The 2d art. of the chap. referred to, giving a lien on *boats*, &c., does not embrace such a building as that described in the bill. It applies exclusively to vessels intended for navigation, as is evident from the provision it makes for mariners and boatmen's wages, for the service of process on the clerk or other officer of the boat, from the remedy it provides for labour bestowed on boats, built or repaired without the jurisdiction of the State, but which may come within it, &c.

For the foregoing reasons, we think the building mentioned in the record is embraced by the statute under which this suit was commenced, and that the Court erred in dismissing the bill.

Ezra v. Manlove.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. I. Battell, for the plaintiffs.

C. Baker, for the defendants.

EZRA v. MANLOVE.

EXECUTION ISSUED AT REQUEST OF SURETY.—A *fiery facias* on a justice's judgment which was replevied, issued at the request of the surety before the expiration of the replevy, without an affidavit, is, under the statute of 1838, irregular and void.

SAME—ABANDONMENT OF LEVY.—If an execution so issued be levied by the constable, he may, when informed of the invalidity of the writ, abandon the levy.

PLEADING.—A plea asserting a right founded on a statute, should aver every fact necessary to show that the case is within it.

APPEAL from the *Tippecanoe* Circuit Court.

SULLIVAN, J.—*Scire facias* by *Ezra* against *Manlove*, replevin-bail for one *Sumner*, commenced before a justice of the peace. The cause was before this Court at the *May* term, 1843, when it was remanded for further proceedings. At the *June* term, 1844, of the Circuit Court, the defendant, by leave of the Court, filed four additional pleas. The first states that before issuing the *scire facias* in this behalf, and before the *fi. ja.* referred to in said *sci. ja.* was issued, to wit, on the 6th of *February*, 1840, the justice issued a *fi. ja.* on said judgment against *Sumner*, the original debtor, which was delivered to a constable of the township duly commissioned, &c., by which he was commanded to levy, &c.; that the

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*constable did, on, &c., seize by virtue thereof and take into his possession divers goods and chattels, the property of said *Sumner* (which are enumerated in the plea), more than sufficient to satisfy said judgment, and which said goods and chattels the constable did afterwards voluntarily abandon, and suffer the same to be taken beyond his reach

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and control, and has made no return whatever of said *fi. ja.*; wherefore, &c. The second plea is similar to the first. The question before us does not require the remaining pleas to be noticed. A motion to reject the pleas was overruled, whereupon the plaintiff filed a replication to the first and second pleas. The substance of the replication is, that the *fi. ja.* issued by the justice, to wit, on the 6th of *February*, 1840, as alleged by the defendant, was issued before the stay of execution had expired on said judgment, without an affidavit being filed by the defendant or any person on his behalf, and without the request of *Sumner*; that the *fi. ja.* was issued without any authority of law whatever, and for that reason and none other was by said justice recalled as was his duty in that behalf, and the goods and chattels levied on were returned to said *Sumner*. The defendant rejoined, that the *fi. ja.* was issued by the justice at the instance of the defendant, *Manlove*, and that *Sumner* did, before the execution was called in by the justice, voluntarily deliver to the constable the goods and chattels in said plea set forth, to be held by the constable by virtue of said execution, and to be sold by him for the payment and satisfaction of said judgment. Special demurrer to the rejoinder, demurrer overruled and judgment for the defendant.

The execution of the 6th of *February*, 1840, was issued before the expiration of 150 days, the time for which the judgment against *Sumner* had been replevied. *Ezra*, the plaintiff, had no agency in procuring the writ. It was issued on the application of *Manlove*; and the question is whether he has brought himself within the statute which authorizes, in certain cases, an execution to go on a judgment that has been replevied, before the expiration of the replevy. Unless he has done so, the writ was void, and all proceedings under it were consequently invalid. The 49th section of the Rev. Stat., 1838, p. 374, provides that when any bail for the stay of execution shall become apprehensive that, by execution

[*391] *being delayed until the full term of the stay shall have expired, he may be compelled to pay the judgment, such bail may go before the justice on whose docket he

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stands as bail, &c., and make and file an affidavit that he is apprehensive of being compelled to pay such judgment if execution be further delayed, and thereupon, at the request of such bail, the justice shall issue execution against the original judgment-debtor, &c. Without an affidavit, *Manlove* had no right to demand, and the justice had no power to issue, the execution of the 6th of *February*, 1840. It was a void writ, and if it were levied by the constable, he was justifiable in abandoning the levy when informed of the invalidity of the writ.

To say nothing about the question of departure that is raised by the demurrer, we are of opinion that the rejoinder is defective in not showing that *Manlove* brought himself within the statute. An execution could issue only as authorized by the statute, and it is a general rule that in asserting a right founded on a statute, the pleader should aver every fact necessary to inform the Court that his case is within it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler and *D. Mace*, for the appellant.

Z. Baird, for the appellee.

 JACKSON, on the Demise of GORDY, v. GREEN and Others

A DECREE in chancery, however erroneous the proceedings may be, is not a nullity, if the Court had jurisdiction of the subject-matter and of the parties.

 DANIELS and Another, Executors, v. RICHIE and Others.

PLEADING—PRACTICE—OYER.—If a defendant having craved and obtained *oyer* of an instrument declared on, demur to the declaration without spread-

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ing the instrument on the record, the demurrer stands as if *oyer* had not been craved.

PLEADING.—A declaration is not objectionable because it describes the plaintiffs as executors, and sets out a cause of action in their own right.

[*392] *ERROR to the *Allen* Circuit Court.

DEWEY, J.—*T. and W. Daniels*, describing themselves as “the executors of the estate of *J. Daniels*,” brought an action of covenant against *Richie, McMahan, and Lasselle*. The declaration sets out a demise under seal, executed by the plaintiffs and the defendants, by which the former leased to the latter certain premises for three years; and by which the defendants covenanted to repair, fence, and clear, &c., the leased premises, and to pay to the plaintiffs a certain yearly rent. The declaration also alleges that the defendants entered into the possession of the premises, and held them for the specified time. The breaches assigned are, that the defendants did not repair, fence, clear, &c., and did not pay the rent. No *proport* of letters testamentary is made. The defendants craved *oyer* of the lease, and of the letters testamentary, which was granted. They then demurred to the declaration generally, but did not spread the instruments of which *oyer* had been granted upon the record. Demurrer sustained, and judgment for the defendants.

The ground assumed in support of the decision of the Circuit Court is, that the plaintiffs had no authority, as executors, to make a lease; and can not, therefore, sustain this action.

We do not think this ground is open to the defendants in error. Having omitted to set out the lease and letters testamentary, (of the latter of which the defendants had no right of *oyer*), their demurrer stands as if no *oyer* of those instruments had been craved. They form no part of the record, and we must confine our view of the cause to the declaration. In that the plaintiffs are indeed described as executors, but it does not appear that the cause of action accrued to them in that capacity; they are not alleged to have demised the premises as executors; nor are the premises averred to have belonged to the testator; but the covenants are laid to have been

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made to the plaintiffs individually. Even had the lease been shown to have been made by the plaintiffs in their capacity of executors, and the covenants had been made to them in the same capacity, we could not have pronounced the instrument void. The will, from which they derived their authority, might have empowered them to make the lease. But as the pleadings stand, the question of their authority does not arise.

And there is also another question not necessary [*393] *to be now determined, which may have some bearing on the merits of the cause; and that is, whether if the plaintiffs had no legal authority to make the lease, the defendants who actually enjoyed the premises under it, can question the title of their landlords. Viewing the declaration as setting forth a lease made by the plaintiffs personally, and containing covenants by the defendants to them personally, which are alleged to have been broken, we consider it good, and that the demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and J. G. Walpole, for the plaintiffs.

D. Wallace, for the defendants.

THE STATE, on the Relation, &c., v. THE STATE BANK.

STATE BANK.—The sum reserved for education by the charter of the State Bank on individual stock, and the *ad valorem* tax thereon, can not, together, exceed one *per cent.* on such portion of said stock as has been paid in, and on account of which the stockholders are not indebted to the State.^(a)

ERROR to the *St. Joseph* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit by which the plaintiff claimed in the declaration the sum of \$177.24 for the State, county, and road tax, assessed by the auditor on the branch at *South Bend* of the State Bank, for the year

^(a) *Bank of the State v. New Albany*. 11 Ind. 139.

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1843. Plea of payment as to part of the amount claimed, and non assumpsit as to the residue. The cause was submitted to the Court upon the following case agreed upon by the parties:

“The number of shares of individual stock in said branch bank is sixteen hundred. Of these shares, thirty-six have been fully paid out; on sixty-five shares, the sum of \$34.37½ has been paid on each; and on fourteen hundred and ninety-nine shares, \$18.75 have been paid on each, making the whole amount of individual stock paid out \$32,140.62. The amount of State, county and road tax, assessed in the county of *St. Joseph*, where said branch is situate, for the year 1843, is fifty-five cents and two mills on the hundred dollars. The amount of tax assessed by the Auditor of State on [*394] said individual *stock, for the year 1843, is \$177.24; of which the said branch has paid the sum of \$112.

On the above statement of facts, if the Court be of opinion that the plaintiff is entitled to assess and receive a tax upon the unpaid stock of said branch, they will find for the plaintiff the sum of \$65.24. On the contrary, should they be of opinion that the plaintiff is entitled to assess and receive a tax only upon the stock paid out, they will find for the defendant.”

The Court gave judgment for the defendant.

The 15th section of the bank-charter is as follows: “There shall be deducted from the dividends, and retained in bank each year, the sum of twelve and a half cents on each share of stock, other than that held by the State; which shall constitute part of the permanent fund to be devoted to purposes of common school education, under the direction of the General Assembly, and shall be suffered to remain in bank, and accumulate, until such appropriation by the General Assembly; and said tax shall be in lieu of all other taxes and assessments on the stock in said bank. And in case of an *ad valorem* system of taxation being adopted during this charter, the said stock shall be subject to the same ratio of taxation as other capital, not exceeding one *per centum* including the

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aforesaid tax; and the said tax shall only be assessed on such portion of the stock as shall have been paid, and on account of which the stockholders shall not be indebted to the State.”

We have heretofore decided, in relation to this section of the bank charter, that, in addition to the twelve and a half cents on a share reserved for education, the individual stock is subject to an *ad valorem* tax; but that the two taken together can not exceed one *per centum*. *The State v. The State Bank*, 6 Blackf., 349. The case now under consideration requires us to notice the manner in which the one *per cent.* is to be ascertained. The State contends, that the sum reserved as aforesaid on a share, which share is \$50.00, is to be considered as a fourth of the one *per cent.*, without regard to what has been paid on it; and that, therefore, the *ad valorem* tax may go as high, in all cases, as three-fourths of one *per cent.* on the amount paid by the holder. But this position can not be sustained. We understand by the 15th section of [*395] the charter, that that part of one *per cent.* on the *sum paid on a share by an individual, without borrowing from the State, which twelve and a half cents is, should be deducted from one *per cent.* on such payment; and that the remainder is the limit of the *ad valorem* tax on the amount so paid.

In the case before us, the sum reserved for education on the shares of individual stock on which only the first installment of \$18.75 has been paid, and the *ad valorem* tax assessed on the amount so paid, make together considerably more than one *per cent.* on that amount; and the assessment of the *ad valorem* tax is therefore too high.

According to this view of the subject, the question submitted to the Circuit Court was correctly decided.

Per Curiam.—The judgment is affirmed.

J. D. Defrees, for the plaintiff.

J. L. Jernegan, for the defendant.

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THE STATE BANK v. BRACKENRIDGE.

CHARTER OF STATE BANK CONSTRUED.—The State Bank can be the owner of real estate only in a few cases, which are enumerated in its charter.

SAME.—Any property of the bank, whether it be land, or promissory notes, or specie, which it acquires and holds under the authority of the charter, is part of its capital stock.

SAME—TAX.—The property of the bank subject to an *ad valorem* tax, is such portion of the individual stock as has been paid in, and on account of which the stockholders are not indebted to the State.

SAME.—The real estate of the bank, acquired and held under its charter, is exempt, as such estate, from taxation.

SAME.—If real estate, exempt from taxation, be assessed for taxes, the levying thereof by the collector can not be justified under the duplicate and precept.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of trover brought by the State Bank for a box of silver coin, containing \$92.00. Plea, not guilty. The cause was submitted to the Court, and judgment rendered for the defendant.

The following are the facts:

The defendant, in 1841, was the county treasurer and collector of *Allen* county; and, as such collector, had legally in his possession the duplicate of the assessment of taxes in said county for that year, for State, county, and road purposes, [*396] with the proper precept commanding him to collect said taxes.

A tax was assessed, named, and charged in said duplicate, against the State Bank, on the following property for said year, viz., a tract of 50 acres of land of sections one and twelve in township 30, range 12, which was owned by the bank in fee-simple, having been conveyed to it by a certain person in payment of a debt due the bank, on which the sum of \$12.00 was assessed as a tax for State, county, and road purposes, and also lots numbered 83 and 84 in the town of *Fort Wayne*, held by said bank in fee-simple on which the banking house stands,

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and on which the sum of \$80.00 was assessed as taxes for State, county, and road purposes, all which taxes amounted to \$92.00.

The lots numbered 83 and 84 had been purchased by the branch at *Fort Wayne*, under a provision of the charter; on one of which lots the banking house stands; and on the other, which is an adjoining lot, the well and some out buildings are situate; the two lots being, in the opinion of the board of directors, required by the branch "for its immediate accommodation in the convenient transaction of its business." These two lots and the banking house were paid for out of the capital stock of said branch.

At the time of said assessment in 1841, the capital stock of said branch was \$160,000; of which the State owned \$80,000; of the balance, \$36,937.50 were advanced to the stockholders by the State; leaving \$43,062.50, paid in by individuals. There was in that year deducted from the dividends, and retained in bank, the sum of \$200 for school purposes; and the further sum of \$236.84, was deducted from the dividends and retained from the stockholders, that being the amount of the general assessment on the stock under the law then in force.

There are two questions presented by this case for our consideration: *First*, Was the above named real estate, or any part of it, liable to the assessment and tax referred to in the record? *Secondly*, If not, were the duplicate and precept a justification for the defendant, in taking the specie mentioned in the declaration?

The first question must be answered in the negative
 [*397] The *bank can be the owner of real estate only in a few cases which are enumerated in the charter, and any such estate that it may thus own, must, we think, be a part of its capital stock. Any property of the company, whether it be land, or promissory notes, or specie, which they acquire and hold under the authority of their charter, is a part of their stock; and there is a provision in the charter respecting its taxation. The substance of the provision is this: There is to be annually deducted from the dividends on each share of

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individual stock, without regard to the amount paid, twelve and a half cents for purposes of education; and there may be, in addition, an *ad valorem* tax on so much of that individual stock, as has been paid in without borrowing from the State; the amount so reserved and the *ad valorem* tax together, however, must not exceed one *per cent.* on the amount so paid. In the case before us, the branch appears to have pursued the proper course as to the sum reserved for education, and as to the *ad valorem* tax for the year 1841. The capital stock in the branch, subject to the *ad valorem* tax of that year, was \$43,062.50; that being the amount paid in as aforesaid by the individual stockholders. There could not, under the charter, be any assessment of an *ad valorem* tax on any other of the joint property of the branch, or, which is the same thing, on any other of its capital stock, than the sum last named. The real estate described in the record, was such as the branch had a right, by the 6th section of the charter, to purchase. A part of it was required "for its immediate accommodation in the convenient transaction of its business;" and the residue had been taken in payment of a debt. It was all, therefore, according to our construction of the charter, exempt, as real estate, from taxation.

The second question to be considered is, were the duplicate and precept a justification for the defendant, notwithstanding the illegality of the assessment?

This question must also be answered in the negative. The tribunal from which the duplicate issued had but a limited jurisdiction; and its determination relative to the assessment of these lands, to which its jurisdiction did not extend, was *coram non judice*. It was shown, too, on the face of the duplicate, that the property belonged to the bank, and was consequently exempt from the assessment. The charter, under *which the exemption is claimed, has a provision declaring it a public act, and all persons are bound to take notice of it. It follows, that the duplicate and precept relied on by the defendant, were no justification for the act for which this suit is brought.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Jernegan, for the plaintiff.

R. Brackenridge, for the defendant.

BOLLES v. HAINES.

RECOGNIZANCE—PLEADING.—In debt on a recognizance indorsed on process requiring bail, the declaration need not aver that a *ca. sa.* had issued against the principal.

SAME.—The declaration in such case should set out the recognizance in terms, or according to its legal effect.

SAME.—The defendant in such suit pleaded that, on, &c., (the date of the recognizance) the principal was and had ever since been notoriously insolvent. He also pleaded, that no sufficient *capias ad respondendum* had issued in the original suit. *Held*, that these pleas were bad.

SAME—PRACTICE.—If in such suit some of the issues are on pleas of *nul tiel record*, and the others on pleas of payment, and are all found for the plaintiff, the former by the Court, and the latter by a jury, the jury should find the amount due the plaintiff.

ERROR to the *Carroll* Circuit Court.

SULLIVAN, J.—This was an action of debt on a recognizance of special bail, indorsed on a *capias ad respondendum* issued out of the *Carroll* Circuit Court in favour of *Haines* against one *Vail*. The defendant pleaded: 1, No such recognizance; 2, That no *capias ad satisfaciendum* had issued against *Vail* on the judgment in the original suit; 3, Payment of the original judgment by *Vail*; 4, Payment by the defendant; 5, That, on, &c., (the date of the recognizance) *Vail* was, and ever since has continued to be, notoriously insolvent; 6, That no good and sufficient writ of *capias ad respondendum* had been issued in the suit of *Haines* against *Vail*; 7, No such record of the judgment in favour of *Haines* against *Vail* as the plaintiff alleges; 8, No *capias ad satisfaciendum* duly prosecuted out of the *Carroll* Circuit Court against *Vail* on the judgment against him in favour of **Haines*, and con-

tinued in the hands of the sheriff four days before its return, &c. To the first and seventh pleas, the plaintiff replied that there were such records of the recognizance and judgment, &c., as alleged in his declaration. To the second and eighth pleas, he replied that a *capias ad satisfaciendum* had been duly issued, &c., and set out in his replication the writ, averring its delivery to the sheriff, its return, &c. To the third and fourth pleas there were replications denying the payments. To the fifth and sixth pleas, special demurrers were filed. Issues of *nul tiel record* were formed on the second and eighth pleas, and the issues on the first, second, seventh and eighth pleas were thereupon tried by the Court and found for the plaintiff. The demurrers to the fifth and sixth pleas were sustained. The issues on the third and fourth pleas were tried by a jury, and a verdict was returned for the plaintiff, but the jury omitted to find the amount due. The Court, thereupon, rendered judgment in favour of the plaintiff for the amount claimed by him.

The issues on the first, second, seventh and eighth pleas were properly tried by the Court. We perceive no error in this part of the case, nor is any complained of. Nor was there any error in sustaining the demurrers to the fifth and sixth pleas. The fifth is no answer to the breach laid in the declaration; and the sixth is an attempt to re-try, collaterally, a matter adjudicated in a former suit.

The demurrers to the pleas reach the declaration; and the plaintiff in error insists that it is defective because it does not aver that a *capias ad satisfaciendum* had issued against the defendant in the original suit, and because it does not set out the recognizance of bail according to its legal effect, nor *in hæc verba*. The declaration states the undertaking as follows, viz.: "That the said *William Bolles*, under his hand and seal, on the back of said writ, acknowledged himself special bail for the said (written 'within named') *Walter R. Vail*, in the suit named in said (written 'within') writ, according to the form of the statute in such case made and provided." It is not necessary in an action of debt on a recognizance of special bail, that the declaration should allege that a *capias*

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ad satisfaciendum had issued on the judgment against the original debtor. If it did not issue, the fact should be pleaded by the defendant, and the plaintiff will then be bound to reply and prove that the writ did issue, that it was delivered to the sheriff, and that it was duly returned.

[*400] But it is essential to correct pleading that a declaration on a contract should state it according to its legal operation, or set it out in terms. 1 Chitt. Pl., 335, 6; *Hysinger v. Colman*, 5 Blackf., 596. The declaration in this case does not set out the recognizance *in hæc verba*, nor does it give its legal effect according to the decision in *Hysinger v. Colman*, *supra*.

There is another error in the record which it may be well to notice. It is that the Court assessed the damages. Beside the issues of *nul tiel record* to be tried by the Court, there were two issues to be tried by the country. The jury that tried those issues should have found the amount due to the plaintiff.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

D. Mace, *R. A. Lockwood*, and *H. O'Neal*, for the defendant.

PARKINSON and Another v. HANNA.

FRAUDULENT CONVEYANCE.—A conveyance of real estate made to defraud creditors will, on their application, be set aside in chancery, if the grantee, before payment of the purchase-money, have notice of the fraud.

ERROR to the *St. Joseph* Circuit Court.

SULLIVAN, J.—This was a bill filed by *Hanna* to set aside a deed made by *Parkinson* to *Webster* as fraudulent against *Hanna*, a creditor of *Parkinson's*. The facts stated in the bill are that, on or about the first of *February*, 1840, *Parkinson* was indebted to *Hanna* in the sum of \$750, which, on being requested, he represented himself as being then unable to pay; that *Hanna* threatened him with a suit, which was actually

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commenced about the 1st of *March* following, and judgment was obtained at the next *October* term; that a few days before the suit was commenced, to wit, on the 28th of *February*, 1840, *Parkinson*, for the purpose of defrauding *Hanna*, conveyed to *Webster*, his co-defendant, who knew that *Parkinson's* object was to defraud the complainant, a [*401] lot in the town of *South Bend*, at and for the pretended sum of \$2,000, payable in ten years with interest annually in advance, and took from *Webster* a mortgage to secure the payment of the purchase-money; that *Parkinson* remained in the possession and enjoyment of the property, pretending and alleging that he did so, to secure the interest accruing to him on the purchase-money; that *Webster* has paid no part of the purchase money nor of the interest to *Parkinson*; that he was at the time of said contract and still is insolvent; and that if said conveyance is permitted to stand, *Hanna* will not be able to realize any part of his judgment; that the sale was a mere contrivance to defraud the complainant, &c. It is further stated that an execution was issued on the judgment at law, by virtue of which judgment and execution, the lot was sold and purchased by *Hanna*, &c.

Parkinson admits in his answer the debt to *Hanna*, the judgment, the sale on execution, and the purchase by *Hanna* as stated in the bill. He admits also the conveyance to *Webster* at the time mentioned in the bill, and that he retained the possession of the premises. He admits his insolvency, and distinctly states that he is the owner of no property except such as is by law exempt from execution; but he denies the insolvency of *Webster*. He denies that the deed was made to defraud *Hanna*, and denies that he knew that *Hanna* was about to sue him. He says that having conveyed the property to *Webster*, he continued to occupy it under a lease from *Webster* for the term of two years, according to which the rent was to be applied to the payment of the interest of the purchase-money, and that at the expiration of the term, *Webster* would or might take possession, &c. *Webster* also answers, and admits that the property described in the bill was con-

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veyed to him by *Parkinson* as stated by the complainant; he says that his purchase of it was *bona fide*; that he did not know at the time of the conveyance that *Parkinson* was indebted; he denies the charge of insolvency; admits that possession of the property was not formally delivered to him by *Parkinson*; and makes the same averment as to the lease to *Parkinson* for two years, &c., that is contained in *Parkinson's* answer.

Depositions were taken, and, at the hearing, the [*402] Court *decreed in favour of the complainant, and set aside the deed from *Parkinson* to *Webster* as fraudulent and void.

According to the common law, as well as by the express provisions of our statute, a deed, or any other conveyance of lands, &c., made to hinder, delay, or defraud creditors, is absolutely null and void. To determine whether the deed from *Parkinson* to *Webster* is fraudulent and void or not, we will refer to the facts disclosed in the pleadings and proof. And here we remark that as to *Parkinson's* intention in conveying to *Webster*, we think there can be no doubt. It is admitted by his answer that, at the time of the conveyance, he was indebted to *Hanna*, and that, in a very few days after the deed was executed, suit was commenced and prosecuted to final judgment. A witness swears that *Parkinson*, in anticipation of the suit, said that he would fix his property so that *Hanna* should not get it. There is other testimony to the same effect. He admits also his insolvency. These facts bring him clearly within the decisions, which declare that a deed made by a debtor under such circumstances, is fraudulent as to creditors.

The next question is, was *Webster* a fraudulent grantee for it is necessary before the deed can be declared void, that he should have been privy to the fraud. *Dugan v. Vattier*, 3 Blackf., 245; *Anderson v. Roberts*, 18 Johns. R., 515. There is no direct proof that *Webster* knew of *Parkinson's* indebtedness at the time of the execution of the deed but there is a principle, which, applied to the case, affects him with notice of the fraudulent intent of *Parkinson*. *Webster's* purchase is

not yet complete, that is, he has not yet obtained the conveyance, and paid the purchase-money. Until he does both, his purchase, as to third persons whose rights are affected by it, is incomplete. As a general rule, notice before actual payment of all the purchase-money, is equivalent to notice before the contract. Even if the purchase-money be secured to be paid, yet if it be not in fact paid before notice, the plea of a purchase for a valuable consideration will be overruled. 2 Sugd. Vend., 274; *Hardingham v. Nicholls*, 3 Atk., 304. It is true, this rule is generally applied in the case of purchasers having a prior lien against subsequent purchasers, but the principle will as aptly apply in conveyances made to defraud creditors. [*403] Under the operation of this rule, **Webster* is chargeable with notice of the fraudulent intent of *Parkinson*. Indeed, if he were not, the law against conveyances made to defraud creditors would be a dead letter. *Webster* has paid no part of the purchase-money, nor has he taken possession of the property, or expended money upon it. To subject it to the payment of *Hanna's* judgment, therefore, can do him no harm. In the language of Lord *Hardwicke*, he is not hurt. But, on the other hand, if this sale were holden to be *bona fide*, a sale on a credit of twenty or thirty years, no part of the purchase-money being paid, nor possession delivered by the vendor, and the rent to be set off against the accruing interest, would also be valid, and creditors would be at the mercy of their debtors.

Under all the circumstances of the case, we are of opinion that the deed from *Parkinson* to *Webster* comes within the statute prohibiting conveyances to hinder, delay, or defraud creditors, and that it is therefore void.

Per Curiam.—The decree is affirmed with costs.

J. A. Liston and *J. H. Bradley*, for the plaintiffs.

J. L. Jernegan, for the defendant.

Munson v. Wray.

MUNSON v. WRAY.

CONTRACT—LEASE.—The following writing signed by *A* was delivered by him to *B*: "Rec'd of *B* \$3.50 for the rent of my brick-house in *Covington* for one month, with the privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843." Held, that this was a lease of the premises given upon an executed consideration by *A* to *B* for one month from the date, and from month to month for five months longer, if *B* should pay *A* at the commencement of each month \$3.50 for rent.

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—*Wray* filed a complaint before two justices of the peace against Mrs. *Munson* for holding over her term as tenant. The complaint contains three counts, the first charging the tenancy to be at will, the second by sufferance, and the third that the defendant procured the possession of the premises by fraud. It does not appear that the defendant put in any plea, but as the cause was tried before the justices, and in the Circuit Court on appeal, not guilty must be [*404] *presumed to have been pleaded. The complaint was filed in *February*, 1844. Verdict and judgment for the complainant.

On the trial, the defendant gave in evidence an instrument in writing, signed by the complainant, as follows, to wit: "Rec'd of Mrs. *Munson* \$3.50, for the rent of my brick-house in *Covington* for one month, with the privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843;" and proved that it had reference to the premises in dispute.

The Court instructed the jury that they must regard the writing merely as a receipt for money; that it was inoperative as a contract because it was not signed by both parties, and gave the defendant no right to the premises for six months from its date.

In general, an executory contract is not valid unless it be binding upon both parties; there must be mutuality of obligation, or there is no consideration for the promise made by the party executing the instrument. Chitt. on Cont., 13, 14; *Bid-*

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dell v. Dowse, 6 B. & C., 255; *Lees v. Whitcomb*, 5 Bingh., 34; *East London Water Works Co. v. Bailey*, 4 Bingh., 283. But this principle is not applicable to this cause. No particular form is necessary to make a good lease. Any words expressive of the intention of the parties, one to part with and the other to take the possession of premises for a definite time, whether in the form of "a license, covenant, or agreement," will constitute a good demise for years. 4 Bac. Abr., Leases, K., p. 160. And, accordingly, it has been held that if one license another to hold a house or land for a certain period, it makes a lease, and may be pleaded as such or as a license. *Ib.*

The instrument in question we conceive to be a lease, given upon an executed consideration by the complainant to the defendant, for the premises therein named for one month from the date, and from month to month for five months longer, provided the defendant should pay at the commencement of each month \$3.50 for rent. We understand from the writing that the \$3.50, acknowledged to have been received by the complainant, were paid by the defendant in advance not only for the first month's rent, but also for the privilege of keeping the premises five months longer upon the [*405] *payment of a similar sum at the commencement of each month. If the defendant made the payments, (or the plaintiff waived them), she had the right to remain in possession of the premises six months from the date of the instrument. That period had not expired when these proceedings were commenced. We think the instruction of the Court to the jury was wrong.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiff.

R. C. Gregory, for the defendant.

COTTINGHAM v. THE STATE, on the Relation of HARE.

GUARDIAN'S BOND—PLEADING.—If the declaration in debt on a guardian's bond assign specific breaches, a plea that the defendant had faithfully discharged the duties of his guardianship is bad; so also is a plea in such case, that the defendant was not guilty of the alleged breaches.

SAME.—The declaration in such suit alleged that the defendant had failed to pay over certain money to his ward after he had arrived at full age. *Held*, that a plea that the defendant had lent the money, &c., should show that the loan was authorized by an order of the Probate Court.

PLEADING.—A plea professing to answer the whole declaration and answering only a part, is bad.

PLEADING—PRACTICE.—A plea professing to answer "part of the declaration," without specifying what part, is valid, if it directly deny a particular and material allegation in the declaration. But the sustaining of a demurrer to such a plea is no cause for reversing a judgment for the plaintiff, if that part of the declaration denied by the plea was not taken into consideration in assessing the damages.

APPEAL from the *Hamilton* Circuit Court.

DEWEY, J.—Debt by the State on the relation of *Hare* against *Cottingham*. The action is founded on a joint and several bond, in the penalty of \$800, executed by the defendant and others, the condition of which, after reciting the appointment of the defendant as the guardian of the person and estate of the relator, is, that the defendant should faithfully discharge the duties and trusts of his guardianship, and render a true account thereof to the Probate Court. The declaration alleges that there came to the hands of the defendant, as guardian, &c., divers sums of money belonging to the relator, amounting to \$500; that there was due [*406] *to the relator, during the guardianship of the defendant, the sum of \$222 from *J. and J. Mahin*, which might have been collected by due diligence, but which was lost by the negligence of the defendant, the debtors having become insolvent; that the relator arrived at full age before the commencement of the action, and demanded of the defendant payment of all sums of money due from him as guardian, that the defendant refused to pay the relator, to deposit the

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money in the Probate Court, or in any manner to account for it; and that the penalty of the bond had not been paid.

The defendant pleaded six pleas, which were all held bad on special demurrer. The damages were assessed by the Court, with the consent of the parties. Final judgment for the plaintiff.

The first plea is, that the defendant truly and faithfully discharged the duties and trusts of his guardianship. The cause assigned in support of the demurrer to this plea is, that it is too general, there being a special breach of the condition of the bond alleged in the declaration. Second plea, that the defendant was not guilty of the breaches of his duty as alleged in the declaration. Cause of demurrer the same as to the first plea.

The third plea, which was to "a part of the declaration," alleges that the defendant, as guardian, &c., received the sum of \$214.07 belonging to the relator, which, "pursuant to the provisions of the statute, and in the faithful discharge of his duty as guardian," he loaned to one *Mahin*, and took his note, with security, for the same; that afterwards, the defendant resigned his guardianship, and one *Mallory* was appointed as his successor, to whom he transferred and delivered the note; and that the defendant never received any other money, assets, or property, belonging to the relator. One of the causes of demurrer to this plea is, that it does not allege that the loan was made by order of the Court of Probate, prescribing its terms.

The fourth plea professes to answer the whole declaration, and avers that the defendant, as guardian, &c., received from one *J. Mahin* his two notes in behalf of the relator, one for \$74.00, and the other for \$141.07; that the defendant resigned his guardianship, and a successor was appointed to whom he delivered the notes; and that **he** never
 [*407] *received any thing else whatever belonging to the relator. Cause of demurrer, that the plea professes to answer the whole declaration, but is an answer to only a part.

Fifth plea, to "a part of the declaration," that there was not

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due to the relator the sum of \$222, nor any part of it, from *J* and *J. Mahin*, as alleged in the declaration. Cause of demurrer, that the plea does not designate what part of the declaration it was designed to answer.

Sixth plea, also to "a part of the declaration," that *J.* and *J. Mahin* were not insolvent as alleged, &c. Cause of demurrer same as the last.

The demurrers to the first four pleas were correctly sustained.

The first plea is in the nature of a plea of general performance of covenants, and is inadmissible, at least under a special demurrer, as an answer to a specific breach of the condition of the bond. The same objection lies to the second plea.

The third plea is an attempt to justify a guardian for not paying money to his ward on attaining majority, on the ground that it had been loaned to a third person. The statute prescribing the duties of the guardian in this case authorized him to loan the money of his ward under the order and direction of the Probate Court. R. S., 1838, p. 197. The plea alleges that the defendant loaned the money pursuant to the statute. Had the plaintiff taken issue on the allegation, it would have referred a matter of law to the jury, which can not be allowed. The plea should have set forth the order of the Probate Court directing the loan, and thus have shown the authority of the guardian to lend the money of his ward. Without such authority and a loan in pursuance of it, he was bound to have the money ready when the ward arrived at full age.

The fourth plea professes to answer the whole declaration, and is bad for the cause assigned in the demurrer, that is, that it answers only a part. One of the allegations in the declaration is, that *J.* and *J. Mahin* owed the relator \$222, which were lost by the negligence of the defendant as guardian. This averment is not noticed by the plea.

The fifth plea is objected to, because it does not expressly point out the part of the declaration to which it was designed to be an answer. But we do not think the objection [*408] can be *sustained. The plea directly denies one of

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the plaintiff's allegations, viz., that *J. and J. Mahin* were indebted to the relator. This, we think, was a sufficient indication of the particular part of the declaration to which the plea referred. The demurrer to this plea should have been overruled. But we do not conceive the error is a good cause for reversing the judgment. The record informs us that in assessing the damages, the Court did not take into consideration that part of the declaration which is denied by this plea. No evidence having reference to it was given. The judgment is precisely the same that it would have been had the demurrer been overruled. The same remarks are applicable to the sixth plea.

Per Curiam.—The judgment is affirmed with costs.

H. Brown, for the appellant.

W. W. Wick and *L. Barbour*, for the appellee.

COX and Another v. HAZARD.

VENDOR AND PURCHASER—OFFER TO CONVEY.—Assumpsit by the assignee of the payee of a promissory note against the maker. The note was dated the 1st of *December*, 1836, and payable ninety days after date. Plea, that the note was executed in part consideration of certain town lots; that on the execution of the note, the payee gave his title-bond to the defendant, the condition of which (after reciting that he had received one-third of the purchase-money, and the defendant's note for the residue payable in three years) was for a conveyance of the lots to the defendant on payment of the residue of the purchase-money; that four years elapsed after said notes and bond were given before this suit was commenced; that the note sued on was given for the one-third of the purchase-money alleged in the bond to have been paid; and that the payee did not on the 1st of *December*, 1839, or at any time previously, execute or offer to execute to the defendant a deed for the lots; wherefore the consideration of the note had failed. *Held*, that the plea was bad.(a)

ERROR to the *Rush Circuit Court*.

BLACKFORD, J.—This was an action of assumpsit brought by *Hazard* against *Cox and Morrow* on a promissory note.

(a) See *Mix v. Ellsworth*, 5 Ind., 517.

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The note was dated on the 1st of *December*, 1836, payable ninety days after date to *James Conwell* or order, and indorsed by *Conwell* to the plaintiff.

Pleas: 1, The general issue; 2, That the note was executed in part consideration of lots numbered 19 and 20 in [*409] the *town of *Laurel*; that on the execution of the note, the payee gave his title-bond to the defendants, the condition of which (after reciting that he had received one-third of the purchase-money, and the defendants' note for the residue payable in three years) was for the making to the defendants a deed for said lots with relinquishment of dower, upon payment of the residue of the purchase-money; that four years elapsed after the said note and bond were given before this suit was commenced; that the note sued on was given for the one-third of the purchase-money alleged in the bond to have been paid; and that *Conwell* did not on the 1st of *December*, 1839, or at any time previously, execute or offer to execute to the defendants, or to either of them, a deed for said lots; wherefore the consideration of the note had failed.

General demurrer to the special plea, and the demurrer sustained. The cause was submitted to the Court on the general issue, and judgment rendered for the plaintiff.

As the plaintiff did not sue on the note described in the declaration, till the whole of the purchase-money was due, the case stands on the same ground on which it would have stood, had the suit been on the note for the residue of the purchase-money. The plaintiff must have offered to execute the deed before the commencement of the suit. The plea is bad for omitting to aver that such offer had not been made. This is not like the case where the purchase-money is to be paid and the deed executed on the same day. Here the deed was to be made on payment of the residue of the purchase-money; and it is therefore sufficient for the plaintiff, if he offered the deed before he commenced the suit.

The record does not show what evidence was given on the trial, or that any objection was made to the proceedings subsequent to the sustaining of the demurrer to the special plea.

Cox and Another v. Wells.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. S. Newman, for the plaintiffs.

G. H. Dunn, *P. L. Spooner*, and *P. A. Hackelman*, for the defendant.

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PLEADING.—In this suit, which was on a promissory note, a plea similar to the special plea in the preceding case of *Cox et al. v. Hazard*, was held to be bad.

CONVEYANCE OF WIFE'S INTEREST.—A conveyance of real estate executed and acknowledged by husband and wife, but in the body of which the wife's name is not inserted, does not convey the interest of the wife in the premises. *a*)

ERROR to the *Rush* Circuit Court.

BLACKFORD, J.—Assumpsit brought by *Wells*, as assignee of one *James Conwell*, against *Cox* and *Morrow* on a promissory note. The note was dated on the 1st of *December*, 1836, and was payable to *Conwell* or order three years after date.

Pleas, 1, Non assumpsit. 2, That the note was given in part consideration of lots numbered 19 and 20 in the town of *Laurel*; that upon the execution of the note, the payee gave to the defendants his title-bond, the condition of which (after reciting that he had received one-third of the purchase-money, and the defendants' note for the residue payable in three years) was, that he would execute to the defendants a deed for said lots with relinquishment of dower, upon payment of the residue of the purchase-money; that the note sued on was for said residue of the purchase-money; and that the payee did not on the 1st of *December*, 1839, or at any time previously, make or offer to make to the defendants a deed for said lots, nor at any time afterwards until the 18th of *September*, 1840; wherefore the consideration of the note had failed.

a) *Davis v. Bartholomew*, 3 Ind., 485.

Replication to the special plea, that on the 15th of *September*, 1840, the plaintiff tendered to the defendants a deed for said lots with relinquishment of dower, executed by said *James Conwell* and his wife, which tender was prior to the commencement of this suit; wherefore the consideration of the note had not failed.

The defendants craved and obtained *oyer* of the deed mentioned in the replication, the substance of which deed is as follows: This indenture witnesseth that the parties to this agreement having considered, &c., do mutually agree as follows, viz., *James Conwell*, the party of the first part, agrees, &c.; and we *Robert S. Cox* and *Charles W. Morrow*, the party of the second part, &c., have purchased of the said [*411] *party of the first part lots numbered 19 and 20, in the town of *Laurel*, and have paid to the party of the first part the sum of, &c. The party of the first part hath granted, bargained and sold, and by these presents doth grant, bargain and sell to the said party of the second part, and to their heirs and assigns, the above described premises, &c. The party of the first part binds himself, &c., to the said party of the second part, &c., to defend said lots against the claims of all persons, &c. In testimony whereof, the said *James Conwell* and *Wineford Conwell*, his wife, have hereunto set their hands and seals this 5th of *September*, 1840. *James Conwell*, (SEAL.) *Wineford Conwell*, (SEAL.)

There is a certificate of a justice of the peace in the usual form indorsed on the deed, stating the acknowledgment of the deed by the said *Conwell* and wife, the wife being examined separately, &c.

Oyer as aforesaid of the deed having been obtained by the defendants, they demurred generally to the replication; but the demurrer was overruled.

The cause was submitted to the Court on the general issue, and judgment rendered for the plaintiff.

On the trial, the plaintiff proved the execution of the note and of *Conwell's* title bond. He also proved that on the 15th of *September*, 1840, he tendered to the defendants a deed for

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the lots aforesaid, the substance of which deed we have already stated, *oyer* of it having been given to the defendants. The deed was objected to by the defendants, but the objection was overruled.

The replication to the special plea is bad because, as we shall presently show, the deed alleged to have been tendered is insufficient. The special plea is also bad. *Cox et al. v. Hazard*, decided at this term. The deed offered in evidence by the plaintiff, and shown on *oyer*, does not convey the interest of *Conwell's* wife in the premises; her name not being inserted in the body of the deed. *Catlin v. Ware*, 9 Mass., 209; *Lufkin v. Curtis*, 13 Mass., 223. The conveyance tendered, therefore, was not such a one as the defendants were entitled to under their contract with *Conwell*.

[*412] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiffs.

G. H. Dunn, *P. L. Spooner*, and *P. A. Hackleman*, for the defendant.

THE RICHMOND MANUFACTURING COMPANY v. DAVIS.

ALTERATION OF INSTRUMENT.—An alteration in a bond or deed made after its execution in a material part, without the consent of the parties, vitiates the instrument. But if the alteration were made with consent of parties, the instrument is valid. (a)

SAME—FILLING BLANKS.—Whether blanks left in a bond when it was signed and sealed, and which were afterwards filled up, had been filled up with the obligor's consent, is a question for the jury.

PRACTICE IN SUPREME COURT.—The Supreme Court will not interfere with the finding of the Circuit Court on a question of fact submitted to it, if the testimony be conflicting.

ERROR to the *Madison* Circuit Court.

SULLIVAN, J.—Debt by the plaintiffs against the defendant

(a) *Grimes v. Piersol*, 25 Ind., 246.

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and one *Sim* on a sealed bill. *Davis* pleaded *non est factum*. *Sim* made default. The cause was tried by the Court. On the issue, the Court found for the defendant *Davis*. Judgment was entered against *Sim*.

The note sued on was for the sum of \$180, payable to the plaintiffs. On the trial, the deposition of a witness was read which stated that he, the deponent, was the subscribing witness to the note, and that "when he was called in to see the note signed it was blank so far as related to their names and to the amount, and when he witnessed it, it was changed only by the addition of the names of the signers, and the blank as to the amount still remained." There is some obscurity in the statement of the witness as above given from his deposition. The parties, however, agree that the note, after it was signed and sealed, was blank, both as to the payee's name and to the amount. The witness further stated that *Davis* and *Sim*, at the time of signing the note, said that it was to be used at the paper mill of *Sheets* and *Yandes*, at *Indianapolis*, for the purchase of paper, and that the quantity of paper that *Sim* proposed to get could not then be stated, but it would amount to \$40.00 or \$50.00 in value. *Sim* took possession of [*413] the note and passed it to the *plaintiffs. The question is, whether the note is binding on *Davis*.

An alteration in a bond or deed after its execution, in a material part, without the consent of the parties, vitiates the instrument. But if the alteration be made, even in a material part, with the consent of the parties, it is valid. We are aware that there is a diversity of opinion, as to whether consent even will give validity to a deed that has been altered after execution in a material part, but the weight of authority is that it will. *Hudson v. Revett*, 5 Bingh., 368; 1 Greenl. Ev., 635, and note 8; *Woolley v. Constant*, 4 J. R., 54. The principle was also recognized by this Court in the case of *The State v. Polke*, Nov. term, 1843. The case of *Texira v. Evans*, cited in 1 Anstr., 228, resembles in some respects the one under consideration. A bond was signed in blank, and given to an agent with instructions to raise money upon it. It was negotiated

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and filled up by the agent, and it was held to be a good bond. That decision has been questioned both in *England* and in the *United States*, but there are several recent decisions that sustain it. *Masters v. Miller*, 4 T. R., 320; *Knapp v. Maltby*, 13 Wend., 587; 22 Wend., 348.(1) And a bond executed in blank as to a material part, with parol authority to an agent to fill up the blank and deliver it, which he did, was held valid. *Ex parte Kerwin*, 8 Cowen, 118. In neither of those cases, however, did the agent transcend his authority; and it is to be observed, that in all the cases that sustain as valid a bond imperfectly executed and afterwards completed, the consent of the obligor is established. We have been cited to the case of the *Bank of St. Clairsville v. Smith et al.*, 5 Ohio R., 222, as maintaining a contrary doctrine; but that case turned upon the construction of the statute of *Ohio* relative to the negotiability of sealed bills. This Court however has decided, that the statute of this State on the same subject will not bear such a construction. *Lewis v. Wilson*, 5 Blackf., 370.

It is always a matter of fact for the jury to decide, whether consent was given or not, and that brings us to the point upon which this case must turn. The testimony is, that at the time the note was signed and sealed by *Davis*, it was said that it was to be used at the mill of *Sheets* and *Yandes*, and for the purchase of paper that should not exceed in

[*414] *amount \$50. Opposed to this is the circumstance that there was a blank left for the names of the payees, as well as for the amount, and the inquiry arises, why, if the note was to be negotiated at the mill of *Sheets* and *Yandes*; was it not made payable to them in the first instance? These conflicting facts and circumstances were necessary to be weighed and decided by the tribunal whose duty it is to decide matters of fact, and they have been so decided in favour of the defendant. If upon this testimony the Court, which, by consent of the parties, was substituted for a jury, were authorized to decide that *Davis* did not consent to the alteration, their decision must stand, for it has been the unvarying practice of this Court to leave the verdict of a jury undisturbed on a

Haworth v. Maxwell, in Error.

question of fact, where the testimony has been conflicting. We think the testimony taken together was of such a character, as that the Court might decide that it did not establish, to their satisfaction, the consent required. The fact then being decided by the tribunal chosen by the parties for that purpose, that *Davis* did not consent to the note as it now stands, either before or after it was filled up, we can do no otherwise than affirm the judgment of the Circuit Court.

Per Curiam.—The judgment is affirmed with costs.

C. Fletcher, O. Butler, and S. Yandes, for the plaintiffs.

H. and H. Brown, for the defendant.

(1) The case of *Texira v. Evans*, cited in the text, is expressly overruled in *England*, on the ground that to allow the blank to be filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle, that an attorney to execute and deliver a deed for another must himself be appointed by deed. *Hibblewhite v. McMorine*, 6 M. & W., 200.

HEATON v. COLLINS, on Appeal.

IN debt against *A* and *B*, the process was served on the former only, but both afterwards appeared to the suit. *A* pleaded to the action; *B* said nothing. The cause was submitted to the Court, and judgment rendered against *A* alone. *Held*, that the judgment, being against only one of the defendants, was erroneous. *Tipton v. Barron*, 5 Blackf., 154.

[*415] *HAWORTH v. MAXWELL, in Error.

A *SCIRE FACIAS* on the transcript of a justice's judgment for execution against real estate, must show that the transcript of the judgment and proceedings was *certified* by the justice, as well as filed in the clerk's office. R. S., 1838, p. 375.

CARPENTER and Others v. MONTGOMERY

LEGISLATIVE POWER.—The Legislature may declare statutes in force from and after their passage in cases of emergency; and of the existence of the emergency, the Legislature is the judge.^(a)

FINAL RECORD—COSTS.—The clerks of the Circuit Courts are not authorized to make a final record in any cause, at the costs of the losing party, except in certain cases, unless such party direct the record to be made.

ERROR to the *Gibson* Circuit Court.

DEWEY, J.—Motion to tax costs. The following are the facts: At the *March* term, 1843, of the *Gibson* Circuit Court, an action of assumpsit between *Carpenter* and others, who are the plaintiffs in error, and *Montgomery* and others, was tried, and the verdict and judgment were for the defendants. The clerk of the Court, who is the defendant in error, without any directions from the plaintiffs, made up a final record of the cause, and taxed against them the usual fees for so doing. Afterwards, on the 8th day of *May*, 1843, the statutes of that year were deposited in the office of the clerk of the *Gibson* Circuit Court. At the *March* term, 1844, the plaintiffs, having given the clerk due notice, moved the Court to disallow the fees charged for the final record. The parties appeared; the motion was heard and overruled.

We think the decision was wrong. By a statute passed in *January*, 1843, it was provided, that no final record should be made by the clerks of the Circuit Courts, at the costs of the losing party in any cause, except in criminal cases, cases in chancery on final hearing, in actions in which the title to real estate had been tried and determined, or in which heirs, executors, administrators, or guardians were parties, unless

[*416] *the losing party should direct the record to be made. The act was declared to be in force from and after its passage. Laws, 1843, 68, 69. The cause in which the clerk made up the final record was not within any of the exceptions of the statute. By the constitution of this State,

(a) *Gentile v. The State*, 29 Ind., 409; 11 Id., 424.

Collins v. Love, on Appeal.

statutes are not to be in force until they are published in print, unless in cases of emergency. Of the existence of the emergency the Legislature must necessarily be the judges; and when they deem it to exist, they have the right to declare a statute in force from and after its passage. They have exercised that right with regard to the law under consideration. Consequently, as the clerk made up the final record after the passage of the act, and without instructions to do so, he had no right to charge fees for it. The motion to disallow that charge should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. I. Battell and C. Baker, for the plaintiffs.

W. W. Wick and L. Barbour, for the defendant.

COLLINS v. LOVE, on Appeal.

A COUNT in malicious prosecution alleged that the defendant, intending, &c., went before a justice, &c., and falsely, &c., and without, &c., charged the plaintiff, &c., and thereupon falsely, &c., and without, &c., procured the justice to make his warrant, &c. *Held*, that the count was not objectionable because the alleged charge did not authorize the issuing of the warrant.

A count in such action stated that the defendant contriving, &c., heretofore, viz., on &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatever, charged the plaintiff with having committed perjury, and with having wilfully and feloniously, &c., sworn false, &c., and on the last-mentioned charge, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatever, procured the plaintiff to be arrested by his body, and to be imprisoned for the space of twelve hours,
[*417] *and until the defendant, afterwards, on, &c., at, &c.,

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falsely and maliciously, and without any reasonable or probable cause whatever, procured the plaintiff to be conveyed in custody before *Aaron Mote*, and then and there being a justice of the peace, &c., to be examined, &c.; that said justice, having heard and considered all that the defendant could say against the plaintiff, touching and concerning the said supposed offense, adjudged that the plaintiff was not guilty, &c., and caused him to be discharged, &c. To the plaintiff's damage, &c. *Held*, that this count was not so defective as to authorize the Court to instruct the jury to disregard it.

In such suit against *A B*, an affidavit charging the plaintiff, &c., proved to have been made by *A B*, and agreeing with that described in the declaration, is admissible evidence for the plaintiff.

If a count would be considered good after verdict for the plaintiff, the jury ought not to be charged to disregard it.

 LOCKWOOD and Another v. THE STATE, in Error.

A JOINT *scire facias* will not lie on a several recognizance. *Thompson et al. v. The State*, 4 Blackf., 188; *Hildreth v. The State*, 5 Id., 80. And the objection, when shown by the *scire facias*, may be assigned for error. *Chandler v. The State*, 5 Blackf., 471.

 RYHN and Wife v. COCHRAN.

CHANCERY PRACTICE.—A suit in chancery was ready for final hearing, under the act of 1838, as soon as the issue was completed, unless depositions were to be taken.

WILL.—It was not necessary, under the act of 1831, to the validity of a will that it should be recorded in the recorder's office.

APPEAL from the *Tippecanoe* Circuit Court.

DEWEY, J.—This was a bill in equity to foreclose a mortgage, filed by *Cochran* against *Ryhn* and wife in the office of the clerk of the *Tippecanoe* Circuit Court on the 15th of *January*, 1842. The answer was filed on the 7th day of the next term commencing on the 28th of *February*, 1842. It [*418] *admits the debt and mortgage as stated in the bill; but alleges that the consideration of the debt and mortgage was the purchase by *Ryhn* from the complainant of the mortgaged premises, which the complainant represented he held by a clear, unincumbered title in fee-simple; that *Ryhn*, believing the representation to be true, purchased the property, took a warranty deed for it, and gave the mortgage mentioned in the bill, executed by himself and wife, to secure the payment of the purchase-money; that he afterwards discovered that the complainant's title was not good; that one *James Cochran* formerly owned the property, and devised it to his daughter *Margaret C. Cochran*, one of his heirs at law; that she intermarried with one *Joseph Cochran*, and joined him in a deed of conveyance of it to the complainant, who sold it to the defendant *Ryhn*, and took the mortgage in question to secure the payment of the purchase-money. The defect in the complainant's title is alleged to be in this,—that the will of *James Cochran*, devising the property to his daughter *Margaret C.*, was never “proved and recorded” legally, and, therefore she took nothing by it. The answer is made a cross-bill. On the 8th day of the term, the complainant filed his answer to the cross-bill, and admits that he represented his title to be perfect; that *James Cochran* once owned the mortgaged premises; that he devised them to his daughter *Margaret C.*; and that the complainant held them by a deed from her and her husband. He contends that the will was duly proved, and “recorded in the proper will record,” and that his title was good and unincumbered. On the ninth day of the term the cause being called, the complainant moved the Court “to set it down” for final hearing then; the defendants objected, but the motion was granted; the cause was heard and determined “on

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the bill, answer, cross-bill, answer thereto, and exhibits;" and the Court decreed a foreclosure and sale of the mortgaged premises.

On the hearing, the complainant produced and read a copy of the will of *James Cochran*, and the probate thereof, duly certified.

It is contended that the Circuit Court erred in going into the final hearing of the cause at the time it was called. By the chancery practice act, in force at that time, an issue might be made up by bill and answer, when a special [*419] *replication was not necessary, and the issue being completed, no continuance was given unless depositions were necessary. R. S., 1838, p. 440; *Andrews v. Jones*, 3 Blackf., 440. The issue in this cause was finished by the filing of the answer to the cross-bill; and was of such a nature that no depositions were needed by either party. Indeed, the only matter in dispute was the validity of the will. The evidence was all documentary. The defendants neither claimed the right to file any further pleading, nor did they pretend that they were unprepared on the score of absent evidence. There was no valid objection to hearing the cause as soon as the issue was made.

It is also urged that the decree is erroneous, on the ground that the complainant had no title to the property which he sold to *Ryhn*, and of which he took a mortgage from him to secure the purchase-money. The objection made to the title is, that the will of *James Cochran* was invalid because it was not recorded, in proper season, in the office of the recorder of deeds.

The language of the statute of 1831, which governs this cause, is: "That proved wills, testaments, and codicils, devising real estate, or an interest therein, shall be admitted to record in like manner as proved conveyances of real estate, and the records, and copies of such records, shall be of like force and effect as in cases of conveyances of real estate; but no lands, tenements, or hereditaments, shall pass by any will, testament, or codicil, to any person or persons, devisees in such

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will, testament, or codicil, who shall know of the existence thereof, and have the same in their power to control for the term of three years, unless within that time, such person or persons shall cause the same to be duly proved according to the provisions of this act; but such neglect shall be deemed fraudulent, and shall avoid such devise." R. S., 1838, p. 315. Admitting the place of recording wills, designated by the statute, to be the recorder's office, we do not understand the meaning of the language quoted to be, that they shall lose their efficacy unless they are recorded within three years after the devisee has knowledge and control of them. It is the failure to prove the will within the specified time, which avoids the devise. Wills, &c., are to be admitted to record as deeds are, and the records of them, and the copies of the [*420] *records, are to have the same effect as the records and copies of records of deeds have. The recording of a deed has never been considered as essential to its validity. It is important only as a mode of giving notice of the existence of the deed; and its omission can be prejudicial only when the want of notice will give the preference to a younger claim.

Per Curiam.—The decree is affirmed with 3 *per cent.* damages and costs.

D. Mace, for the appellants.

R. A. Lockwood, *W. M. Jenners*, and *R. Jones*, for the appellee.

 ATKINSON and Another v. STARBUCK.

DELIVERY-BOND—PLEADING.—Debt on a delivery-bond, the condition reciting the *fi. fa.*, but not the judgment. Pleas, 1, No consideration; 2, The bond was obtained by fraud, covin, and misrepresentation; 3, Payment of the judgment before the execution issued. *Held*, on general demurrer, that the pleas were good.(a)

(a) *Gaspar v. The State*, 11 Ind., 548.

ERROR to the *Washington* Circuit Court.

BLACKFORD, J.—*Starbuck* brought an action of debt against *Atkinson* and another, before a justice of the peace on a delivery-bond. The bond, which was filed before the justice as a cause of action, is in substance as follows: Know all men, &c. The condition of the above obligation is such, that, whereas a writ of *fi. fa.* issued, &c., against the above bound *John Atkinson* at the suit of *Benjamin Starbuck* for the sum of, &c., which has been levied, &c., on one bay mare, &c.; if, therefore, the said *Atkinson* shall deliver to the sheriff, on, &c., the said mare, to be then and there sold according to law, then the above obligation to be void. Pleas as follows: 1, No consideration; 2, The bond was obtained by fraud, covin, and misrepresentation; 3, Payment of the judgment before the execution issued; 4, Similar to the second; 5, Similar to the third. Replications in denial of the pleas. The cause was tried by the justice, and judgment rendered for the plaintiff. The defendants appealed.

In the Circuit Court, the plaintiff withdrew the replications, and demurred generally to the pleas. The demurrers were sustained; the damages assessed; and judgment rendered for the plaintiff.

[*421] *We think the pleas are good on general demurrer.

As the execution is recited in the bond sued on, the defendants were estopped from denying the existence of the execution. But the judgment is not so recited, and the defendants therefore might show there was no judgment, or that it had been paid. If, for example, the execution issued without any judgment, the goods were not subject to the levy, and the plea of no consideration was applicable to the case. It would be the same if the judgment was paid before the execution issued; and the third and fifth pleas, therefore, are substantially good as amounting to pleas of no consideration. To the pleas of fraud, there can be no objection.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. C. Griffith, for the plaintiffs.

H. P. Thornton, for the defendant.

Dawson v. Compton.

DAWSON v. COMPTON.

ATTORNEY AND CLIENT.—Where charges were filed against an attorney at law, under the statute of 1838, for failing to pay over money, &c., it was held that the only judgment that could be rendered against the defendant was that of suspending him from the practice of the law.

SAME.—The latter clause of the statute, which provides that an attorney or counsellor at law who shall fail to pay over money collected, &c., shall pay ten *per cent.*, &c., was held to apply to suits brought for the recovery of the money.

SAME—DAMAGES.—In said proceeding, by filing charges, &c., it was held that the defendant might show the circumstances under which the money had been retained, in mitigation, if not in justification of his conduct.

APPEAL from the *Allen* Circuit Court.

SULLIVAN, J.—At the *February* term, 1842, of the *Allen* Circuit Court, *Compton*, the defendant in error, filed charges against *Reuben J. Dawson* and *Thomas Johnson*, partners, attorneys and counsellors at law of said Court, for refusing to pay to him, after reasonable request made, moneys collected by them as such attorneys for his use. *Johnson*, one of the defendants, died pending the suit. The defendants pleaded several pleas. Three of them were pleas of payment, setting up matters of set-off under the statute. One of them was a plea averring that the money collected belonged to [*422] one **Grimes*, to whom, as the plea alleged, the debt had been assigned by *Compton*. There was another plea by *Johnson* alone, which, in consequence of his death and of the matter pleaded, need not be noticed. The first and second pleas were pleas of payment. To the first there was a general demurrer, which was sustained by the Court. To the second there was a replication denying the payment. The third, fourth, and fifth pleas were rejected on motion. The issue on the second plea was tried by the Court, and judgment rendered against the plaintiff in error for the sum of \$172.66.

The judgment of the Circuit Court can not be sustained. The proceedings are founded on the act entitled “An act supplemental to the act entitled an act regulating the admission

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and practice of attorneys and counsellors at law." R. S., 1838, p. 86. The provisions of the statute are that where any attorney or counsellor at law shall collect for his employer any money, and shall neglect or refuse to pay the same over on being requested so to do by any person authorized to receive the same, it shall be lawful for such person, his agent or attorney, to file, in the clerk's office of the proper county, charges against such attorney or counsellor, setting forth the facts of the case, and give notice, &c.; and the Court, on hearing the allegations and proofs, if they shall be of opinion that the attorney or counsellor has collected the money and has refused to pay the same to the person entitled to receive it within a reasonable time after request, shall suspend the attorney or counsellor from the practice of law in any of the Courts of this State, &c. The statute confers no power on the Court to pronounce any other judgment against the delinquent attorney than to suspend him from the practice of the law. The injured client must seek redress in another form of action. This statute, because it acts upon the offender by a new and summary proceeding, and is in its character penal, should receive a strict construction. The latter clause of the act which provides that an attorney or counsellor at law who shall fail to pay money collected by him, &c., shall pay ten *per cent.*, &c., applies to suits brought for the recovery of the money.

We are also of opinion that the Court erred in sustaining the demurrer to the first plea, and in rejecting the third and fifth. In this *quasi* prosecution, the defendants should [*423] be permitted *to show the circumstances under which the money was withheld, in mitigation, if not in justification, of their conduct.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. H. Coombs, for the appellant.

Gresham v. Bowen and Another.

MUIR v. CLARK, in Error.

A BILL in chancery for relief against a usurious contract, must show that the principal and lawful interest have been paid or tendered; and in the case of a tender, the money must be brought into Court. *Crawford et al. v. Harvey*, 1 Blackf., 382.

The 33d section of the R. S., 1843, p. 582, respecting "the interest of money," applies only to bills of discovery.

A bill in chancery showing that the complainant has no equity, may be objected to at any stage of the proceedings. *Cummins v. White et al.*, 4 Blackf., 356.

GRESHAM v. BOWEN and Another.

CA. SA.—PRACTICE.—A *ca. sa.* issued under the statute of 1838 on a justice's judgment, without a previous return of *nulla bona* to a *fi. fa.*, or an affidavit filed as prescribed by the statute, is illegal; and a bond for the prison-limits, executed upon the arrest of the judgment-debtor on a *ca. sa. so* issued, is without consideration.

ERROR to the Carroll Circuit Court.

DEWEY, J.—*A. H.* and *N. W. Bowen* brought an action of debt against *Hamilton* and *Gresham*, on a prison-bonds bond. The declaration sets forth the recovery of a judgment by the plaintiffs below against *Hamilton* before a justice of the peace, the issuing of a *ca. sa.* upon the judgment, the arrest of *Hamilton* upon the execution, and the giving of the bond by *Hamilton* and *Gresham*, upon which the action is founded. The condition of the bond is, that *Hamilton* should attempt no manner of escape, but should remain a true prisoner within the prison-bonds. Breach, that *Hamilton* [*424] did *not remain a true prisoner, but escaped and went at large beyond the prison-bonds. A return

Moody v. The State, in Error.

of "not found" was suggested as to *Hamilton*. *Gresham* demurred to a part of the declaration, and the demurrer was correctly overruled. He then pleaded three pleas, two of which, the first and the third, were properly decided to be bad upon demurrer.

The second plea was, that no return of *nulla bona* had been made, nor affidavit filed before the justice, previously to issuing the execution on which *Hamilton* was arrested. A general demurrer to this plea was sustained. Damages assessed by the Court by consent of the parties; and final judgment for the plaintiffs.

The judgment is erroneous. To authorize the justice to issue the *ca. sa.* on which *Hamilton* was arrested, there should have been a return of no goods found to a *feri jacias*, or an affidavit, prescribed by the statute, filed with the justice. R. S., 1838, p. 381. The plea negatives both the return and the affidavit, and consequently shows that the *ca. sa.* was illegally issued. The arrest of *Hamilton*, therefore, was unlawful so far as the plaintiffs were concerned, and the bond for the prison-bonds was executed without consideration. The demurrer to the second plea should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. P. Biddle, for the plaintiff.

A. L. Robinson, for the defendants.

MOODY v. THE STATE, in Error.

AN indictment can not be sustained without proof that the offense was committed in the county where the venue is laid. 1 Chitt. C. L., 557.

The caption of an indictment may, by leave of the Court, be amended by the prosecuting attorney. 1 Chitt. C. L., 335.

Johnson, Administrator, v. Robertson and Another, Executors.

[*425] *JOHNSON, Administrator, v. ROBERTSON and Another, Executors.

WIDOW'S PORTION.—A widow has no claim on her deceased husband's estate, relative to the \$100 worth of personal property allowed her by the act of 1838, if she fail to select the property before the sale of it by the executor.

ERROR to the *Shelby* Probate Court.

SULLIVAN, J.—*Semela Campbell*, the complainant's intestate, filed a bill against the defendants as the executors of *Joses Campbell*, deceased, her late husband, praying that the proceeds of certain articles of property mentioned in the bill, be paid to her by the executors in lieu of the \$100 worth of property, which, by the law then in force, she was authorized to select from the personal estate of her deceased husband, and retain without accounting therefor, &c. Pending the suit, *Semela Campbell* died, and the suit progressed in the name of her administrator, the present complainant.

The prayer for relief is founded on the following facts set forth in the bill: In *December*, 1838, *Semela* and *Joses Campbell* were married; in *April*, 1841, on account of ill-treatment from her husband, and for the preservation of her health, she left him and removed to the State of *Illinois*, where she remained until she heard of his death; that three or four months after his death, she returned to *Shelby* county in this State, where he died, and found on her arrival that the defendants, as the executors of her late husband, had inventoried and sold all his personal property amounting to about \$593. The bill then enumerates certain articles of property, which had been sold by the executors as the property of *Joses Campbell*, and prays that the defendants may be decreed to pay the sum for which they sold. The defendants demurred to the bill. The demurrer was allowed, and the bill dismissed.

The act of 1838, sect. 10, R. S., 1838, p. 238, which is the law governing this case, after declaring that the widow of any decedent shall be entitled to one-third of his personal property in the distribution thereof, after the payment of debts, and that

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she may select one-third of the goods at the valuation, &c., further provides that such widow, over and above the [*426] privileges aforesaid, may select at the time of *valuation \$100 in value of the personal estate of her deceased husband, for which she shall not be required to account, &c.

The only question that need now be decided is whether the widow, having failed to make the selection of the \$100 worth of property allowed her by the statute, before the sale of it by the executors, can turn round and make that amount a charge upon the estate. We are of opinion she can not. If we were to follow the statute literally, we should be compelled to say that she must make her selection at the very time the property is inventoried and valued, and that if she failed to do so, her right to select was gone. We think, however, the statute will bear a more liberal construction, and that the selection may be made at any time before the goods pass out of the hands of the executor or administrator. It is the widow's privilege to select for her own use \$100 worth of the personal property. The executor or administrator is not bound to set apart, and tender to her, property of the requisite amount. The articles are to be of her own selection, and if she does not select before they have passed into other hands, she must be presumed to have waived her privilege.

The Legislature, in the R. S. of 1843, in order to remedy what was supposed to be a defect in the statute of 1838, passed an amendatory act, in which it is provided that a widow, when the property of her deceased husband shall have been sold without a selection being first made by her, shall be entitled to receive out of the proceeds of the sale the amount in money, according to the value of the property she was authorized to retain. The last named statute assists us in construing the statute on which the claim in this bill is founded.

Per Curiam.—The decree is affirmed with costs.

J. Morrison and *S. Major*, for the plaintiff.

R. Mayhew, for the defendants.

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CRIMINAL LAW—CHANGE OF VENUE.—In a criminal cause taken by a change of venue from one Circuit Court to another, the record on a writ of error must show, not only that the Court before which the indictment was found, but also that the Court which tried the cause, had jurisdiction of the offense.(a)

SAME—JURISDICTION.—The jurisdiction of the Court that tried the cause can be shown only by a statement, in the nature of a caption to its proceedings, that the indictment was filed there; and that the prisoner was tried upon it.(b)

SAME—INDICTMENT.—The indictment should also constitute a part of the record of the last-mentioned Court.

SAME—INSTRUCTIONS TO JURY.—The Court, on the trial of such cause, instructed the jury as follows: "If the defendant has omitted to avail himself of evidence within his reach, by which he might have repelled that which was offered to his prejudice, his omission to do so supplies a strong presumption that the charge is well founded." *Held*, that the instruction was erroneous.

ERROR to the Allen Circuit Court.

DEWEY, J.—This was an indictment found in the *Steuben* Circuit Court against the plaintiff in error, for the murder of *Lorenzo G. Noyes*. The prisoner, upon his arraignment, having pleaded not guilty, a jury was impaneled for his trial. The jury, not being able to agree upon their verdict, were discharged with the consent of the prisoner, who, thereupon, applied for and obtained a change of venue. The cause was ordered to the county of *Allen* for trial, and the clerk was directed to transmit a transcript of the proceedings, and the original papers, to the Circuit Court of that county. The transcript containing a copy of the indictment was duly filed according to the order; and the Circuit Court of *Allen* county proceeded to try the prisoner upon the issue joined in the *Steuben* Circuit Court. The trial resulted in the conviction of the prisoner of murder in the second degree, and his being sentenced to the State Prison at hard labour for life. But

(a) *Pulling v. The State*, 16 Ind., 458.(b) *Hall v. The State*, 23 Ind., 150; 16 Id., 93.

it does not appear that the indictment was ever filed, or recorded, in the *Allen* Circuit Court. For aught that was shown, the prisoner was tried on the transcript of the proceedings in the *Steuben* Circuit Court.

Among other instructions given to the jury, and excepted to by the prisoner, is the following, viz.: "That if the defendant has omitted to avail himself of evidence within his reach, by which he might have repelled that which was offered [*428] to *his prejudice, his omission to do so supplies a strong presumption that the charge is well founded."

The questions presented for our consideration are, 1, Does the record show that the *Allen* Circuit Court had the right to take cognizance of the cause? and, 2, Was the charge to the jury right?

Whenever a criminal cause is removed from an inferior to a superior Court, by *certiorari*, or writ of error, the caption of the indictment must show that the Court, before which the indictment was found, had jurisdiction of the offense charged against the prisoner. 1 Chitt. C. L., 327. It is evident that, under our practice of changing the venue in criminal cases from one Circuit Court to another, it must appear on a writ of error, not only that the Court before which the indictment was found, but also the Court which tried the cause, had jurisdiction of the offense. The jurisdiction of the latter Court can only be shown by a statement, in the nature of a caption to its proceedings, that the indictment was there filed, and that the prisoner was tried upon it. The indictment should also constitute a part of the record of that Court. The record before us contains no statement that the indictment was ever filed in the *Allen* Circuit Court, nor that the prisoner was put to his trial upon it; nor does it appear to have been recorded there. The transcript containing a copy of the indictment was filed; but it was the indictment itself, and not a transcript of the proceedings of the *Steuben* Circuit Court, which could authorize the *Allen* Circuit Court to exercise jurisdiction over the cause. The omission to show jurisdiction in the Court below must be fatal to its judgment.

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But independently of this point, there is an error in the charge to the jury which must have reversed the judgment. It is undoubtedly true, that when circumstances are proved which induce a strong suspicion of the prisoner's guilt, but which, if untrue, it is manifest he can disprove, or, if reconcilable with his innocence, he can explain, and he fails to disprove or explain them, the jury are authorized to draw from such failure a forcible inference against him. 2 Stark. Ev., 937. But this inference is merely a presumption of fact, and does not constitute a presumption of law to be given by the Court to the jury as a fixed and binding rule of jurisprudence. The failure is a circumstance which, like any [*429] other *circumstantial evidence, the jury are to weigh, and of the weight and tendency of which they are the sole judges. Something beyond this doctrine is contained in the charge under consideration. The jury were instructed, that if the prisoner had within his reach evidence by which he could have repelled the evidence which had been given against him, and he failed to produce it, the failure raised a strong presumption of his guilt. If, as the hypothesis contained in the charge implies, the prisoner actually had it in his power to repel and explain away the force of the adverse evidence, it is difficult to perceive how his failure to do so could raise a presumption of his guilt. The hypothesis itself presupposes his innocence whether he adduced the rebutting evidence or not; for if such evidence be admitted to be in his power, the presumption is that he is innocent.

Many objections to the legality of the proceedings of the Allen Circuit Court, besides those which we have noticed, were made; but we have deemed it unnecessary to consider them, as they may not arise in any future trial of this cause.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. B. Howe, D. H. Colerick, and J. G. Walpole, for the plaintiff

A. A. Hammond and S. Major, for the State.

BROWN and Another v. HART.

VENDOR AND PURCHASER—TITLE BOND.—To debt on bond conditioned for the conveyance of real estate within a certain time, the defendant may plead that the deed had not been demanded before the commencement of the suit.

SAME.—But it is not necessary that the holder of such bond should prepare the deed and present it to the obligor to be executed.

SAME—PLEADING—PRACTICE.—One of the counts on such bond, setting forth the condition and assigning breaches, was barred by a valid plea. The other count was on the penal part of the bond only; and a plea thereto (*oyer* having been obtained of the condition) was correctly overruled on demurrer, but no breaches were suggested. *Held*, that damages could not be assessed for the plaintiff on either count.

[*430] *ERROR to the *Marion* Circuit Court.

DEWEY, J.—*Hart* brought an action of debt against *Brown* and *Wilson*. The declaration contained two counts. The first count set forth a bond executed by the defendants on the 5th of *March*, 1840, in the penalty of \$600, and the condition thereof. The recital prefacing the condition was, that *Brown* had theretofore executed a bond to one *L. J. Chapin* for the conveyance to him of a certain lot in *Indianapolis*, on the 1st of *October*, 1839, which bond *Chapin* had assigned to the plaintiff; and that the plaintiff and *Brown* had agreed to postpone the delivery of the deed until the expiration of one year from the date of the second bond, unless *Brown* should sooner obtain the legal title to the lot, which was then in a third person, in which case, the deed was to be made when he should obtain the title. The condition was, that if *Brown* should, within one year from the date of the bond, or sooner if he procured the title, convey the lot in fee-simple to the plaintiff free from incumbrance, the bond should be void, &c. And the parties stipulated in the condition of the bond, that if it should become forfeited, the damages should be \$300. Breach, that *Brown* did not within the year, nor at any other time, make the deed, though often requested, &c.; nor did he pay the \$300 in damages.

The second count was on the penal part of the bond, without setting forth the condition.

The defendants craved *oyer* of the bond and condition mentioned in the first count. The instrument given on *oyer* corresponded with that set forth in the first count, excepting that the condition recited that *Brown* had executed a bond to *L. B. Chapin*, instead of *L. J. Chapin*. The defendants thereupon pleaded two pleas to the first count: 1, That the plaintiff did not demand a deed from *Brown* before the commencement of the action; and, 2, That the plaintiff had not prepared and presented a deed to *Brown* to be by him executed, before the action brought.

The defendants also craved *oyer* of the bond mentioned in the second count and the condition thereof; and they pleaded to that count a plea which was properly overruled on demurrer. No breach was suggested under the second count.

General demurrers to the two pleas to the first [*431] count were *sustained; and the damages having been assessed by the Court, with the consent of the parties, there was a final judgment for the plaintiff.

We think the judgment can not be sustained. The demurrer to the first plea to the first count should have been overruled. Agreeably to a former decision of this Court, where a vendee is entitled to a conveyance of real estate, by virtue of a title bond, he can not maintain a suit on the bond without having first demanded a deed of the obligor. *Sheets v. Andrews*, 2 Blackf., 274. This suit is founded on such a bond; and as the plea under consideration alleges no demand of a deed was made before the commencement of the action, it is a good bar to the first count. The circumstance that a deed was already due to the plaintiff when this bond was given, by virtue of a former bond which was abandoned or canceled, can make no difference. The present contract was substituted in the place of the old one, and stipulates for a different time for the delivery of the deed. It must be construed according to its own terms; and neither party can derive any benefit from the abandoned contract.

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We think the demurrer to the second plea to the first count was correctly sustained. It is the practice in *England* for the vendee of real estate to prepare a deed and present it to the vendor to be executed. But that practice has never been adopted in this State; nor do we think the nature and situation of our titles to land, or the public convenience require that it should be adopted. The parties to a contract may stipulate for such a course if they please, and the contract will be binding. *Fairfax v. Lewis*, 2 Rand., 20.

As the first count was barred by a valid plea, and the second count, though unanswered, contained no assignment of a breach of the condition of the bond, it was incorrect to assess damages under either count. If the plaintiff meant to rely upon the second count, he should have spread the condition of the bond upon the record after the demurrer to the plea to that count was sustained, and have suggested a breach upon the record. 1 Will. Saund., 58, n.; 2 Id., 187, n.

Whether the difference in the initials prefixed to the surname of *Chapin*, as they appear in the condition of the bond set forth in the first count, and that given on *oyer*, constitutes a material variance, we do not deem it necessary to decide.

[*432] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Brown, for the plaintiffs.

C. Fletcher and *O. Butler*, for the defendant.

JACOBS v. FINKEL.

EVIDENCE TO VARY WRITING.—A written agreement can not be controlled by setting up a contemporaneous verbal understanding of the parties inconsistent with it.

PLEADING.—A plea professing to answer the whole declaration, and answering only a part, is bad.

WITNESS—PRACTICE.—The defendant can not introduce a witness to prove facts which, if true, would show that the witness, and not the plaintiff, was entitled to the subject-matter of the suit.

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CONTINUANCE.—A motion to continue the cause in order to procure the testimony of an interested witness, may be overruled.

PRACTICE.—If a contract, materially different from the one described in a count, be given in evidence by the plaintiff without objection, its admission is not error; but such contract will not support the count.

ERROR to the *Wayne Circuit Court*.

DEWEY, J.—Assumpsit by *Finkel* against *Jacobs*. The declaration contains four counts. The first count alleges that, on the 14th of *February*, 1839, the plaintiff and defendant made a written agreement, by which the defendant bargained and sold to the plaintiff “twenty acres of land, known by the name of *Evans’ Red House*, and one acre across the National road, and five acres of woodland east of the *Jacksonburgh* road,” for the sum of \$1,300, \$500 to be paid on the 1st of *March*, \$250 on the 1st of *March*, 1840, \$250 on the 1st of *March*, 1841, and \$300 on the 1st of *March*, 1842, with six per cent. interest from the date; that the plaintiff paid the defendant \$500 on the 1st of *March*, 1839, \$100 on the 1st of *March*, 1840, and the residue of the purchase-money, with all interest, on the 1st of *March*, 1842; and that the defendant had not, on the day of making the contract, nor at any time afterwards, any title whatever to the lands, and would not and could not make a title to the same.

Second count—That on the 14th of *February*, the defendant bargained and sold to the plaintiff certain other lands described as in the first count) for the sum of \$1,300, [*433] *then and there paid by the plaintiff; and that the defendant promised the plaintiff he had good right and title to the lands; when in fact he had not then, nor at any time since, any title at all to the premises, or to any part of them, which he well knew.

Third count—Money had and received.

Fourth count—That the defendant, on the 14th of *February*, 1839, made his agreement in writing, by which he agreed that he had bargained and sold to the plaintiff certain other lands, (described as in the first and second counts, for the same price, and upon the same payments as in the first count), and by

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which he agreed that, upon the payment of the purchase-money, he would make the plaintiff a deed in fee-simple for the lands; that the plaintiff had paid the defendant \$1,000 of the purchase-money before the last installment became due; and that the defendant never had any title to the premises, and could not convey them.

The defendant pleaded the general issue, and a special plea purporting, in its commencement, to answer the whole declaration, which special plea was in substance as follows, viz.: That the one acre and the five acres of land, mentioned and described in the written agreement set forth in the declaration, as being in addition to the twenty acres known by the name of the *Evans' Red House* tract, were not in addition thereto, but formed a part of that tract, and were so understood to do by the parties; that, at the date of the contract, the title to the land was in one *Edward Jacobs*, as whose agent the defendant contracted to sell it to the plaintiff, which he knew; that *E. Jacobs* was ready, at all times after the making of the contract, to convey the land to the plaintiff upon his paying the purchase-money either to *E. Jacobs* or the defendant; that, at the time of pleading, the title was in the defendant, who was ready to convey it to the plaintiff upon the payment of the purchase-money, which he never paid to the defendant nor to *E. Jacobs*. The plaintiff demurred to the special plea, and the demurrer was sustained.

The defendant then moved the Court to continue the cause. The motion was founded upon an affidavit setting forth that *E. Jacobs*, who lived in *Pennsylvania*, was a material witness for the defendant, by whom he expected to prove [*434] *that the defendant, in making the contract mentioned in the declaration, acted as the agent of the witness, in whom was the title to the land contracted to be sold to the plaintiff, all which was known to the plaintiff who agreed to receive a deed from the witness, and did actually accept one from him. The motion was overruled.

The cause was submitted to the Court for trial under the general issue. Judgment for the plaintiff.

The plaintiff gave in evidence, without objection, a written instrument, dated on the 14th of *February*, and signed by the plaintiff and defendant, by which the latter "bargained and sold" to the former "twenty acres of land, known by the name of *Evans' Red House*, one acre across the National Road, and five acres of wood-land east of the *Jacksonburgh* road," for \$1,300, &c., corresponding in the terms of payment with those of the agreement set out in the first and fourth counts. The plaintiff also proved the payment of the first \$500 specified in the agreement, and two years' interest on the residue of the purchase-money. There was evidence tending to prove that, at the date of the contract, on the 14th of *February*, 1839, and, at the time the last installment was due, on the 1st of *March*, 1842, the defendant had no title to the premises.

The questions are, did the Court decide correctly in sustaining the demurrer to the special plea, in refusing a continuance, and in rendering judgment for the plaintiff? We think the decisions were all correct.

The plea is bad for two reasons, first, because it professes to answer the whole declaration, but in fact answers but a part of it. The declaration contains four counts, in the first and last of which a written agreement is set forth. The plea, after its commencing clause, has reference to these two counts only leaving the other two entirely unnoticed. The other defect of the plea is, that it attempts to control a written agreement by setting up a contemporaneous verbal understanding of the parties inconsistent with it. The written agreement, alleged in the first and fourth counts, is for the sale of twenty acres of land known by the name of *Evans' Red House*, and also for six acres besides, making in all twenty-six acres. The [*435] plea alleges the real understanding of the parties *to have been, that the six acres were not in addition to the twenty acres designated by name, but were included in and formed a part thereof. To allow such a plea would be permitting a written contract to be controlled by a verbal one, a principle which we have again and again held to be inadmissible. *Odem v. Beard*, 1 Blackf., 191; *Foley v. Cowgill*, 5 Id.,

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18; *Burge v. Dishman*, Id., 272; *Graves v. Clark*, 6 Id., 183; *Wilson v. Black*, Id., 509; *Mahan et al. v. Sherman*, at this term.

We think the continuance was correctly refused; first, because a part of the testimony sought to be procured from the absent witness, was liable to the same objection as that last urged against the plea. The written contract set up in the declaration does not, in direct words, contain a promise on the part of the defendant to make a deed to the plaintiff for the land contracted by the former to be sold to the latter; but as the defendant sold the land to the plaintiff and was to receive the purchase-money from him, the legal effect of the contract was that he, the defendant, should convey the title; but it was proposed to prove by the witness, that the real understanding of the parties was that the plaintiff should receive the deed from the witness. This, as has been already shown, was clearly not allowable. There was, moreover, an objection to the witness which rendered him entirely incompetent. He was interested in the event of the suit. It was proposed to prove by him, that the defendant, in making the contract of sale with the plaintiff, acted as the agent of the witness, in whom was the title to the property contracted to be sold; that the plaintiff had full knowledge of these facts; and that the witness did actually make a conveyance of the property to the plaintiff which was accepted by him. The object of the action, as appears by the declaration, was to recover back money which had been paid upon a consideration which had failed, to wit, money paid by the plaintiff for land which the defendant contracted to sell to him, but to which it was alleged he could not make a title. Now if the defendant could establish by the witness that he, the witness, was the real owner of the land; that he had sold it by his agent; and that the plaintiff had actually received a deed from him in [*436] fulfillment of the contract made by such agent; *it is clear that the witness, and not the plaintiff, can maintain an action against the defendant for the money received by him on account of the land; and that he can also support

an action against the present plaintiff for that portion of the purchase-money not paid. It is plain, we think, that the witness was interested to defeat this suit.

As to the decision of the Court upon the evidence: Had there been no counts in the declaration but those which describe the written contract, the testimony would not have justified the judgment. The written contract, as declared on, was for the sale of the twenty acres of land known by the name of *Evans' Red House*, and for one acre and for five acres besides. The instrument given in evidence was a different contract. The land described by it was not twenty acres known by the name of *Evans' Red House*, and one acre, &c., and five acres, &c., as alleged in the declaration, but twenty acres of land known by the name of *Evans' Red House*—one acre and five acres lying, &c. By this description, we understand the six acres to be included in the *Red House* tract. Unless the instrument receives this construction, it will be impossible to identify the six acres, and the contract as to them is void for that reason. But by viewing the six acres as a part of the twenty acres, the whole tract can be easily identified by the specific name given it. Had the variant contract been objected to, it could not legally have been given in evidence under the special counts. As it was, its admission did not constitute an error, but it was not sufficient to sustain those counts, founded on a different contract. But there was one count under which it was proper to be given in evidence—the count for money had and received. The construction of the contract really made by the parties, most favorable to the defendant, is, that he was bound to make the plaintiff a deed for the premises on the day the last installment of the purchase-money became due, (which was the 1st of *March*, 1842), if the plaintiff should then be ready to pay him the full price of the land; and this, we think, is the true construction. As there was evidence that the plaintiff had paid a part of the purchase-money before that time, and as there was also evidence tending to show that the defendant

[*437] had not then, or at any time, *title to the premises

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which he contracted to sell, we can not say the Court erred in rendering a judgment for the plaintiff.

Per Curiam.—The judgment is affirmed with costs.

J. Rariden, for the plaintiff.

J. S. Newman, for the defendant.

GOODSELL and Others v. STINSON.

FRAUDULENT MORTGAGE—DELIVERY.—A mortgage of real estate to *A* was, in his absence and without his knowledge, signed and sealed by *B*, and delivered by him to the recorder of the proper county to be recorded; and *C*, afterwards, before the mortgagee had assented to the mortgage, obtained a judgment against the mortgagor. *Held*, that the judgment was entitled to the preference.(a)

ERROR to the *Vanderburgh* Circuit Court.

SULLIVAN, J.—*Stinson*, a judgment-creditor of *Frederick E. Goodsell*, filed a bill in chancery to set aside, as fraudulent and void, a mortgage executed by *F. E. Goodsell* and wife to *Peter Goodsell*. The bill alleges that on the 1st of *October*, 1840, the complainant recovered against *F. E. Goodsell* and one *Shanklin* a judgment for the sum of \$2,712.29, the greater part of which is still due and unpaid; that on or about the date of the judgment, *F. E. Goodsell*, who resided at *Evansville* in this State, conveyed by deed of mortgage to his father, *Peter Goodsell*, who resided in the State of *New York*, all his real and personal estate, falsely pretending that he was indebted to his father in a large sum of money, &c.; that the deed was never delivered to *Peter Goodsell* nor to any other person for him, but was fraudulently delivered by the said *F. E. Goodsell* to the recorder of *Vanderburgh* county to be recorded, and was by him recorded without the request or assent of said *Peter*; that in consequence of said recorded mortgage, the judgment of the complainant is inoperative, &c.

(a) *Woodbury v. Fisher*, 20 Ind., 387; 17 Id., 47.

The bill prays that the mortgage may be declared null and void, and that the property therein named be subject to the complainant's judgment.

[*438] *The answer of *F. E. Goodsell* admits the judgment as stated in the bill, and that the respondent executed the mortgage to *Peter Goodsell* in the absence of the latter, but denies the fraud. He says that he was justly indebted to *Peter Goodsell* in a large sum of money, amounting to about \$1,800, for money lent and advanced to him before that time; and that *Peter Goodsell* had incurred certain liabilities for him in the city of *New York* to a large amount; and that the mortgage was made in compliance with a previous agreement with said *Peter*, and without any fraudulent intent whatever. He admits that on or about the 9th of *September*, 1840, he executed the mortgage and delivered it himself to the recorder of *Vanderburgh* county to be recorded, believing that to be a sufficient delivery to the grantee.

Peter Goodsell, in his answer, denies that the mortgage was made with a fraudulent intent. He admits that at the time it was made he resided in the State of *New York*, and that *Frederick*, the mortgagor, resided in the State of *Indiana*. He says that his son *Frederick* was indebted to him in the sum of \$1,500, money previously loaned to him; and that he had also incurred liabilities for *Frederick*, as his indorser, to the amount of about \$800; and that the mortgage was made by *Frederick*, and delivered to be recorded, in pursuance of a previous request from him to secure said debt, and to indemnify him against said indorsements. He states that in *July*, 1840, *Frederick* requested him by letter to send to him as soon as possible a statement of the amount he owed him, and saying "that he would make a mortgage to him to secure him in case of accidents." Respondent immediately sent a statement to *Frederick* as requested, and in *November* following he was informed by *Frederick* that the mortgage was made and recorded. He further states that on the 5th of *February*, 1841, he wrote to *Frederick* inclosing a letter of attorney to *Amos Clark* of *Evansville*, constituting him his attorney, and giving him, as

he believes, full power to act for him in all his business, and directed *Frederick* to deliver the letter of attorney to *Clark*; that he was afterwards informed by *Frederick* that he had received the letter of attorney, and he supposes that it is with the mortgage in the possession of *Clark*,
[*439] *but has no evidence from *Clark* of either being in his possession.

The deposition of *Frederick E. Goodsell* was taken and read by consent of parties. In his deposition he repeats what is stated in his answer relative to the execution of the mortgage, and leaving it at the recorder's office to be recorded. He furthermore states that he had nothing more to do with it afterwards; that it was in the possession of *Amos Clark* some two or three months after its execution, since which time he had not seen it.

The Circuit Court was of opinion that the deed was void and decreed accordingly.

We do not think the facts of the case will warrant the conclusion, that the mortgage was made with a design to delay or defraud the creditors of the mortgagor. We therefore direct our attention to the question upon which we think the case must turn, and that is, whether there were a delivery and acceptance of the deed previously to the rendition of the judgment in favour of the complainant against *Frederick E. Goodsell*. The deed was left with the recorder on the 9th of *September*, 1840, to be recorded. The judgment in favour of the complainant was rendered on the 1st of *October*, 1840. In *November* following, *Peter Goodsell* was informed by *Frederick* that the mortgage was made and recorded, and on the 5th of *February*, 1841, *Peter Goodsell* appointed *Amos Clark* his attorney in fact to transact and attend to his business at *Evansville* for him.

The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery, unless the rights of third persons should be affected by it. In

that event the doctrine of relation would not apply, for it is a general rule that it shall not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice. *Case v. De Goes et al.*, 3 Caines, 261; *Jackson d. Griswold v. Bard*, 4 J. R., 230;

Menvil's Case, 13 Coke R., 19. It is contended in [*440] this case, that the deed was delivered *when it was recorded. The weight of authority is otherwise. In *Jackson v. Phipps*, 12 J. R., 418, it was decided that where a debtor, living in *New York*, made to his creditor, living in *Massachusetts*, a deed for his farm as security for a debt, and left it at the proper office to be recorded, but that neither the grantee nor any person on his behalf was present to receive it, and the grantee soon after died, whereupon the deed was sent to his heir, there was no delivery. To the same effect is the case of *Jackson v. Richards*, 6 Cowen, 617. In that case, it appears that a deed had been made to a grantee, but had not been delivered to, nor received by her; that it was executed and recorded without her knowledge or consent. The Court said that the deed acquired no efficacy from the circumstance of its being recorded. There was nothing in that act equivalent to a delivery. Any instrument, says the Court, which upon the face of it is regular, and purports to be a deed or conveyance, may be recorded. But if it is not in truth what it purports to be, it will not be aided by being engrossed by a recording clerk, and put upon the files of a public office. *Vide*, also, *Maynard v. Maynard et al.*, 10 Mass. R., 456. We do not mean to be understood as saying, that the subsequent assent of a grantee to the delivery of a deed, made to a recording officer to be recorded, would not be a valid delivery as between the parties; but the assent must be established by other proof than the mere fact that the deed was recorded.

We now proceed to inquire, whether the subsequent assent of *Peter Goodsell* to the act of the grantor can be considered as an acceptance of the deed, so as to relate back to the time it was deposited with the recorder to be recorded. We have already said that the doctrine of relation can not be admitted

to the injury of third persons. It is a fiction of law, and the rights of third persons are not to be destroyed by fictions. The complainant in this case is a judgment-creditor, and has, by the operation of his judgment, a lien upon the land described in the mortgage, unless the judgment-debtor had parted with the land previously to the rendition of the judgment. Leaving the deed to be recorded was not, as we have shown, equivalent to a delivery. The only acts of *Peter Goodsell*, which [*441] we regard as evidence of *his assent to the deed, were his letter to *F. E. Goodsell*, and his power of attorney of the 5th of *February*, 1841, authorizing *Amos Clark* to receive the deed which had been made and put upon record for his benefit. There was no valid delivery, therefore, until the assent of *Peter Goodsell* was given. Previously, the complainant's lien had attached, for, at the rendition of the judgment, no assent to the delivery had been given by the grantee, and the title was still in the grantor. The case of *Samson v. Thornton*, 3 Met., 275, bears strongly on this point. In that case, an agreement was made for the sale of land at a certain sum per rod, and a deed was made out, but not acknowledged and delivered, because the land had not been measured. The owner afterwards acknowledged the deed, and sent it to the registry without the knowledge of the grantee. The Court held that the grantee had no title as against a creditor of the grantor, who had attached the land before the grantee had accepted the deed, and had afterwards levied an execution upon it. In *Hedge et al. v. Drew*, 12 Pick., 141, a deed which was delivered to the register of deeds by the grantor for the use of the grantee, to which the latter subsequently assented, was held to prevail against an attachment by a creditor of the grantor, made after such assent. But it is plainly inferible from the language of the Court, that if the attachment had been laid upon the land before the assent was given, the creditor would have held the land.

Our conclusion is, that on the 1st of *October*, 1840, the title to the real estate described in the mortgage was in *Frederick E. Goodsell*, and that the judgment of the complainant is a lien

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upon it. Upon the personal property mentioned in the deed, the judgment is no lien. As to such property, the lien attaches from the time that the *fi. fa.*, or other writ of execution, is delivered to the sheriff to be executed.

We think the Circuit Court erred in setting aside the mortgage-deed as fraudulent and void. As between the parties, and as to all the world except those having a prior right, the deed is valid. The decree should have given a priority only to the complainant's judgment, and let the mortgage stand, for it may be that the security is sufficient for both creditors.

[*442] **The Court* reversed the decree and rendered a decree for the complainant conformably to the above opinion.

C. I. Battell and *S. Yandes*, for the plaintiffs.

C. Baker, for the defendant.

DOE, on the Demise of MOORE and Wife, v. ABERNATHY.

INFANT—DEED OF.—A deed of bargain and sale of real estate, executed by an infant for valuable consideration, is voidable, but not void.

SAME—DISAFFIRMANCE OF.—A female infant residing in *Pennsylvania* executed there a deed of bargain and sale for land situate in this State. She afterwards married, but whether before or after her majority did not appear, nor did it appear where, after the execution of the deed, she and her husband had resided, nor that her husband had acquiesced in the deed after he knew of it. *Held*, that the lapse of about five years after the wife's majority, without any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it. (a)

SAME—EJECTMENT.—An action of ejectment for premises conveyed by the lessor whilst an infant, commenced after his majority, and within a proper period, is a valid avoidance of the conveyance; but the grantee or tenant in possession must be notified of the intention to disaffirm before the commencement of the action.

SAME.—In ejectment for an entire tract of land, any undivided portion of it may be recovered.

(a) *Somers v. Pumphrey*, 24 Ind., 231; Id., 385; 4 Id., 403.

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DESCENT.—Brothers and sisters of the half-blood inherited, under the act of 1818, the estate of a deceased brother, equally with brothers and sisters of the whole blood.

[*443] *ERROR to the *Rush* Circuit Court.

DEWEY, J.—Ejectment on the demise of *Moore* and wife against *Abernathy* for a quarter section of land. Plea, not guilty. An agreed case presents the following facts, viz.:

Samuel Ross, a citizen of *Pennsylvania*, was the patentee of the land in controversy; he died in 1821, on a journey commenced for the purpose of removal to this State, intestate, and without issue, leaving his mother and eight brothers and sisters of the full blood, and four of the half-blood, the latter having a different mother from the former; his mother and two of his brothers of the full blood (the latter leaving no issue) died intestate before the date of the demise laid in the declaration. *Rebecca*, one of the lessors of the plaintiff, married to *Moore*, the other lessor, is a sister of the full blood. On the 4th of *November*, 1833, in the State of *Pennsylvania*, *Rebecca*, being then sole, and lacking about five months of full age, joined several of her brothers and sisters in a deed of bargain and sale, conveying the land in controversy to one *Clawson*, in fee-simple, she and each of the other grantors receiving \$100 in money as a consideration for the sale. *Clawson* took possession of the land, and in 1835, for a valuable consideration, conveyed it to one *Orput*, who, in 1839, for a like consideration, conveyed it to the defendant, who held the possession at the commencement of this suit in 1841. In *March*, 1839, the present lessors of the plaintiff commenced an action of ejectment for the same land in the *Rush* Circuit Court, and recovered a judgment; the judgment was reversed in this Court, and the cause finally dismissed. After the dismissal, *Moore*, in behalf of himself and wife, gave the defendant formal written notice that they intended to disaffirm the deed to *Clawson* on account of her infancy at the time of its execution; he also demanded possession of the premises. This action was commenced immediately afterwards. It does not appear when the lessors of the

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plaintiff intermarried, nor where they have resided since the date of *Rebecca's* deed to *Clawson*. The Circuit Court rendered judgment in favour of the defendant.

Two principal questions arise from the above facts. First, was the deed executed by Mrs. *Moore* while under age void, or voidable only? And, secondly, if voidable only, has it been legally disaffirmed?

[*444] *It was held by the Court of King's Bench in *England*, after much deliberation, that an infant's conveyance by lease and release was not void, but voidable. *Zouch v. Parsons*, 3 Burr, 1794. That decision, it is true, has not met with entire approbation, but it has never, we believe, been overruled in that country; and in this country it has been followed by several of the State Courts, has received the sanction of the Supreme Court of the *United States*, and may be considered as generally established law. 2 Kent's Comm., 236; *Jackson v. Carpenter*, 11 Johns., 539; *Kendall v. Lawrence*, 22 Pick., 540; *Kline v. Beebe*, 6 Conn., 494; *Bigelow v. Kinney*, 3 Verm. R., 353; *Richardson v. Boright*, 9 Id., 368; *Tucker v. Moreland*, 10 Pet., 58. These cases and others of the same import clearly settle the principle, we think, that a conveyance of real estate by an infant for a valuable consideration is not a void act, but is a valid contract until legally avoided. And we conceive this view of the subject is quite as well calculated to protect the interests of the minor as to consider his conveyance absolutely void; for if it be absolutely void, he could not, on arriving at full age, affirm it, however beneficial to him; but if it be only voidable, he may, in the exercise of his matured judgment, confirm or disaffirm it, as he may deem it advantageous or prejudicial to his interests.

What acts of a person after attaining full age are necessary to confirm or avoid a conveyance made by him during infancy, or, indeed, whether anything more than mere acquiescence is required for the purpose of confirmation, does not appear to be well settled. In *Jackson v. Carpenter*, *supra*, it was held that a deed of bargain and sale made by an infant might be disaffirmed by him after full age, at any period before he was barred

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by the statute of limitations from bringing an action of ejectment; that such a deed might be avoided by a deed of bargain and sale to another grantee, made eleven years after the grantor's majority, and without a previous entry upon the land, provided it was vacant and uncultivated at the date of the second conveyance. The same doctrines are fully recognized in *Jackson v. Burchin*, 14 Johns., 124, and in *Tucker v. Moreland*, *supra*. The principle of these decisions, as to the point under consideration, was that the second deed [*445] disaffirmed the first because *the two acts were equally public and solemn. The disaffirmance of an infant's deed of bargain and sale by a like deed to another grantee made after majority, was supposed (how justly we will not judge), to bear a strong analogy to the avoidance of his feoffment with livery, by a subsequent entry upon the premises. It was not, however, decided by either of the cases mentioned, that a second deed of bargain and sale was the only mode of disaffirming the first. And it appears to us that serious difficulty would grow out of the establishment of such a doctrine. If the land designed to be conveyed by the second deed, should, at the time of its execution, be held adversely, that deed would be void for maintenance, and could neither convey a title nor effect any other purpose. Besides, we do not perceive the propriety of allowing the conveyance of an infant to be disaffirmed, and of denying to him the privilege of personally holding the premises after disaffirmance; and yet such must be the result, if his conveyance by deed can be annulled only by a second deed executed to another grantee; the very act of disaffirmance of his voidable conveyance, would divest him of all title. In *Jackson v. Carpenter*, though the decision turned on the principle already stated, the Court intimated an opinion that the deed of an infant might be avoided in various ways, and, among others, by an action of ejectment. In *Bool v. Mix*, 17 Wend., 119, which was ejectment on the demise of husband and wife, the wife having conveyed while an infant, it was held that an action would not lie to recover land conveyed by an infant by deed of bargain and sale, without a

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previous entry upon the land (it not being vacant and uncultivated), and by the execution there of a second deed to a third person; or without having done "some other act of equal notoriety" in avoidance of the infant's deed; and that "the avoidance, whatever might be its form, must precede the bringing an action to recover possession." We clearly understand from this case, that an entry by an infant, after majority, upon the land previously conveyed by him, and the execution of a deed to another grantee, will vacate the first deed; but what other act of equal notoriety is sufficient for that purpose

we are not informed, nor can we conjecture, unless a
[*446] clue be furnished by the following *language of the

Court: "It is unnecessary on the present occasion, to say that an entry was the only mode in which the deed could be avoided, for the plaintiff, previous to bringing the action, had done no act whatever to disaffirm the conveyance. She had not even demanded possession of the land, or given notice to the tenant that she did not mean to be bound by the deed." It would seem from this passage, that the Court was of the opinion that a demand of possession, or giving notice by the infant, after full age, that he did not mean to abide by his deed, would be a legal disaffirmance of it; and there is another opinion expressed by the Court utterly at variance with the supposition, that they held the doctrine that a disaffirmance of an infant's deed of bargain and sale could only be effected by an actual entry on the land, and the execution there of a second deed to a third person; and that opinion is this, that the second deed, if executed while the land was held by an adverse possession would be void, and could not amount to a revocation of the first deed. Indeed, if it be true that to avoid an infant's deed he must, after full age, enter on the land (if not vacant), and there execute a deed to a third person, and it be also true that such second deed would be void if the land was held adversely, it must follow that an infant's conveyance never can be disaffirmed, if it happen that the land is in an adverse possession always after his arrival at full age. And if the first proposition only be true, as has been

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already remarked, an infant who has conveyed his land can never afterwards hold it himself, because he can only disaffirm his conveyance by an act which necessarily divests him of title.

The cases above referred to all require some positive, solemn, and notorious act, in order to disaffirm an infant's deed of conveyance; but they leave the nature of that act a matter of great doubt, and decide that it may be performed at any time previous to the barring of an action of ejectment by the statute of limitations.

But there is another class of cases which hold that the right of disaffirmance must be exercised within a reasonable time, and that the omission so to exercise it will alone confirm the infant's conveyance. In *Holmes v. Blogg*, 8 Taunt., 35, it was remarked by *Dallas, J.*, "I agree that in [*447] every *instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time," &c.; and nearly the same idea was expressed by *Park, J.* In the case of *Kline v. Beebe*, 6 Conn., 494, it was held that the voidable acts of infants might be affirmed by the omission to disaffirm them within a reasonable time; and that the omission alone for eleven years to disaffirm an infant's deed, was "an acquiescence in the conveyance amounting to a tacit affirmation." The same doctrine is distinctly recognized in *Richardson v. Boright*, 9 Verm. Rep., 368; and it has received the sanction of Chancellor *Kent*, who says, 2 Comm., 5th ed., 238, "his (the infant's) confirmation of the act or deed of his infancy, may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favour of the contract, or from his tacit assent under circumstances not to excuse his silence."

Between these conflicting authorities and opinions,—on the one hand, that an infant's voidable conveyance remains binding upon him, until disaffirmed by some public act to be performed within any period not forbidden by the statute of limitations, and on the other hand, that no disaffirmance can take place

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unless the right be exercised within a reasonable time,—we are not called upon to decide.

In the case under consideration, the infant joined in a conveyance of the premises in dispute in *November*, 1833, and attained to full age in the *April* following, but whether before or after her marriage, the record does not inform us. At the time she conveyed she resided in *Pennsylvania*, and for aught that appears she and her husband have resided there ever since. Early in 1839, about five years after the majority of Mrs. *Moore*, the present lessors of the plaintiff commenced an action of ejectment for the land now in dispute, and recovered a judgment in the Circuit Court, but failed in this Court on the sole ground that they had not given previous notice of their intention to avoid the contract, nothing being determined with regard to their right to disaffirm it. *Clawson v. Doe d. Moore et ux.*, 5 Blackf., 300. It does not appear that Mrs. *Moore*

was sole an instant after her majority, and possessed [*448] the power by her separate act to *avoid her deed; nor does it appear that her husband acquiesced a moment in the contract after he knew she had made it. For aught that appears, the first action of ejectment was commenced so soon as *Moore* was informed of the conveyance by his wife during nonage. And he gave the notice of the intention to annul his wife's conveyance as soon as he was informed that such notice was necessary. Under these circumstances, we are not prepared to say that the lessors of the plaintiff have forfeited their right to disaffirm the deed of Mrs. *Moore*, even upon the supposition that they were bound to exercise it within a reasonable time short of the period allowed by the statute of limitations, with regard to which point we make no decision. Nor do we express any opinion of what would have been the effect of five years' acquiescence on the part of the lessors, had it appeared that they lived in the vicinity of the land in contest, with full knowledge of their rights, and with easy opportunity to notify the tenant in possession of their intention to disaffirm the conveyance made during nonage.

It remains to be inquired whether the lessors of the plaintiff

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did in fact disaffirm the conveyance, and give the defendant notice thereof before the institution of the suit?

We have before remarked, that the cases to which we have referred leave the question of what act will disaffirm a voidable conveyance made by an infant, in a state of great uncertainty. None of those cases has actually decided that any act less than a deed of bargain and sale will operate as a disaffirmance; but several of them imply that some other deliberate and public act will be sufficient for that purpose. And we think we have said enough to show the inconvenience, if not the absurdity, of establishing the doctrine that an infant's deed of bargain and sale can be avoided only by a subsequent deed of the same nature to a different grantee. It has been decided in *Ohio* that any act unequivocally manifesting an intention to disaffirm, would render the avoidance effectual; and that the commencement of an action for the possession was an act of that character. *Lessee of Drake et ux. v. Ramsay et al.*, 5 Ohio R., 251. We concur in the opinion that an action of ejectment for premises conveyed by an infant, commenced after [*449] the majority of the grantor *and within a proper period, is a valid avoidance of his conveyance; but we think (and have so decided as is shown above,) that the grantee or tenant in possession must be notified of the intention to disaffirm before the commencement of the action. This and more has been done in the present instance. An action was commenced in the first place, which ultimately failed for the want of prior notice of intention to disaffirm; that notice in writing was then formally given, and the present action immediately commenced. That these facts constitute a legal disaffirmance of the conveyance by Mrs. Moore to Clawson, under whom the defendant mediately claims, and due notice thereof to him, we can not doubt.

But it is contended that the judgment of the Circuit Court must stand, because the demise laid in the declaration being for an entirety, the lessors of the plaintiff can not recover less than the whole tract of land sued for; and they can not recover that, because it is shown that they have title to but a

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small undivided portion of the whole. This objection is clearly untenable. The one or two cases quoted in support of it must yield to the great preponderance of authority the other way. There is no doubt but that, under a demise of an entire tract of land, any undivided portion of it may be recovered. *Adams on Eject.* 211, and the cases quoted in note. *Samuel Ross*, from whom the lessors of the plaintiff claim by descent, left a mother, eight brothers and sisters of the full blood, and four of the half blood. We have decided that under the law of descents as it stood in 1831, the full and half blood of a deceased brother equally inherited his estate. *Clarke et al. v. Sprague et al.*, 5 Blackf., 412. The law of 1818, which prevailed in 1821, when *Samuel Ross* died, was the same. Laws of 1818, 183. The twelve brothers and sisters therefore left by him, together with his mother, were his heirs at law. The share of *Mrs. Moore*, consequently, in the land sued for, was originally one undivided thirteenth part. This share was somewhat increased by the subsequent death of her mother and two of her brothers. The amount of this additional share will depend somewhat upon the order of their deaths,

for though the brothers and sisters were all heirs to
 [*450] each other, they were not all heirs *of the mother of
Samuel Ross, for she was not the mother of them all.

As the record stands, it does not appear whether the mother or the two brothers died first. The lessors of the plaintiff must, therefore, recover the least favorable increased share growing out of the deaths of the mother and the two brothers.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test and *G. B. Tingley*, for the plaintiff.

C. B. Smith, for the defendant.

WEST v. ROUSSEAU.

ASSAULT AND BATTERY—PRACTICE.—Trespass for an assault and battery, the declaration containing only one count. Pleas, 1, Not guilty; 2, *Son assault demesne*. The plaintiff new assigned. Plea, not guilty to the new assignment. *Held*, that the plaintiff was not obliged to prove two trespasses; but that it was sufficient for him to prove a trespass differing from that justified and agreeing with that described in the new assignment.

ERROR to the *Greene* Circuit Court.

SULLIVAN, J.—This was an action of trespass, assault and battery, brought by the plaintiff in error against the defendant. The declaration contains one count only. The defendant pleaded, 1, Not guilty; 2 and 3, *son assault demesne*. The plaintiff, as to the assaults attempted to be justified in the second and third pleas, new assigned, alleging that it was not for the assault mentioned in either of those pleas that the suit was brought, but for another and different assault which was made upon him by the defendant, on, &c., at &c. The defendant, to the trespass set forth in the new assignment, pleaded not guilty. The cause was tried by a jury. Verdict and judgment for the defendant.

The first question we have to consider is, whether the following instruction to the jury was correct, viz.: "That unless two assaults were proved, the peculiar state of the pleadings requires the jury to find the defendant not guilty."

[*451] *The law of this case, we think, has been misconceived by the Circuit Court. There is but a single act of trespass complained of, although there were in fact, as the two special pleas and the new assignment show, three committed. Two of them are abandoned on the record; the other is insisted on in the new assignment, as the one for which this suit is brought. There being but one count in the declaration, it was necessary, under the circumstances, that the plaintiff should new assign. He was bound to prove, upon the trial, a different trespass from either of those stated and justified in the defendant's pleas, corresponding in every material fact to

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that set out in his new assignment; and this was all he was bound to prove. 2 Stark. Ev., 1141; *Oakley v. Davis*, 16 East, 82. If there had been two counts, and the defendant, beside the general issue to the whole declaration, had pleaded a justification to one of the counts, and the plaintiff, as to the special plea, had new assigned, it would then have been necessary for the plaintiff to have proved two assaults beside that which he had waived, to have availed himself of the trespass in the count not justified; and the reason is, that the trespasses set out in the new assignment, and in the count not attempted to be justified, are distinct acts, and must necessarily, if the plaintiff seek to recover for both, be proved as they are alleged. *Atkinson v. Matteson*, 2 T. R., 172. The instruction of the Court, therefore, under the circumstances of this case, was incorrect.

A question of variance is raised in this Court, but we think it is made too late. It should have been raised on the trial in the Court below. No error or misdirection of the Court is alleged as to that point.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Watts and H. L. Livingston, for the plaintiff.

S. Yandes, for the defendant.

[*452] *SHIRLEY v. SHIRLEY and Another.

STATUTE OF FRAUDS.—The statute of frauds does not require that an agreement for the sale of real estate should be signed by both parties. It is sufficient if it have the signature of the party sued.^(a)

SAME—VENDOR AND PURCHASER.—If by such agreement, the making of the title and the payment of the purchase-money are to be concurrent acts, neither party can sustain a suit on the agreement without having first performed or offered to perform his part of it.

SAME—RESCISSION OF CONTRACT.—Nor can a party to such contract rescind

(a) *Cook v. Anderson*, 20 Ind., 15; 17 Id., 385.

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it without the other's consent, unless there has been an offer of performance on his part, and a refusal to perform by the other.

VENDOR'S LIEN.—A vendee of real estate has a lien thereon for the money paid, if the vendor refuse to convey; and the lien continues against a subsequent purchaser with notice.

APPEAL from the *Orange Circuit Court*.

SULLIVAN, J.—Bill in chancery to enforce a vendee's lien. The following facts are stated in the bill: The complainant and one *James Hudelson*, who died pending the suit, purchased from *Charles Shirley* a tract of land lying in *Orange* county, and entered into a contract in writing under seal dated *October* 4th, 1838, signed by *Charles Shirley*, by which the latter acknowledged that he had received from the former \$382.42, part of \$1,600 which they, *Shirley* and *Hudelson*, had agreed to pay to *Charles Shirley* for the land mentioned in the contract, and which is described in the bill, and which *Charles Shirley* was to convey to them by a general warranty deed free from all incumbrance. In the month of *December* following, the purchasers paid to *Charles Shirley* the further sum of \$109.05, in part payment of said land. The bill then states that the complainants, on, &c., offered to pay the balance of the purchase-money and demanded a deed, but defendant, *Shirley*, refused to comply with his contract, and afterwards sold and conveyed the same land to his co-defendant, *George Monicle*, and emigrated to the State of *Illinois*; that *Monicle*, when he purchased, had notice of the previous purchase of the land by the complainants, and that they had paid a large portion of the purchase-money. *Charles Shirley* and *Monicle* are made defendants to the bill, and the prayer is that the defendant, *Charles Shirley*, may be decreed to pay to the [*453] *complainants the sum of \$491.47, the amount paid by them as part of the purchase-money aforesaid, and that the complainants have a lien on the land to secure the payment.

Charles Shirley, in his answer, admits the sale of the land and the payment of a part of the purchase-money, as stated in the bill. He denies that the purchasers offered, at any time,

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to pay the residue of the purchase-money, or in any way to comply with their contract; but says they refused to do so, and he thereupon sold the land to *Monicle*, &c.

Monicle, in his answer, admits that he purchased the land described in the bill from *Charles Shirley* for the sum of \$1,600; that he paid him \$500 in cash, removed an incumbrance on the land to the amount of \$200, and executed his notes for the balance. He admits that, before he contracted for the land, he was informed that *Jacob Shirley* and *Hudelson* had purchased it, but had failed to pay for it; that he called upon them before he purchased, and informed them that he contemplated purchasing the land, and requested to be informed of the claim they had upon the land, &c., and that he was informed by *Jacob Shirley* that the purchasers wanted their money to be refunded to them and they would be satisfied, &c.; that *Jacob Shirley*, one of the complainants, expressed a willingness to take the note of him, the said *Monicle*, in discharge of the claim for said purchase-money; and that the respondent understood that *Charles Shirley* had afterwards tendered to the complainants the note of *Monicle* for the sum of \$500, &c.

There were replications filed to the answers, and depositions taken.

Henry K. Neff swears that in harvest time, 1839, he went with *Monicle* to see *Jacob Shirley* and *Hudelson*. He says *Monicle's* object was to inquire into the difficulty between *Jacob* and *Charles Shirley* respecting the land. The witness then states the same facts substantially that are related by *Monicle* in his answer, with this addition, that *Jacob Shirley* told him that "he considered he had a lien on the land," and if the "arrangement" (referring to the note of *Monicle*) was not made, he would hold on to the land. *J. P. Hungate's*

testimony sustains the answer of *Monicle*. He was [*454] *present at the above recited conversation, and says

that *Jacob Shirley* expressed a willingness to give up the land, but said he must have his money back and six *per cent.* interest. *Jesse Toliver* says, that he heard *Charles Shirley*

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say that he was to let the complainants have a note of \$500. *C. Shirley* requested the witness to go to *J. Shirley* and *Hudelson* and inquire whether they would take said note. They said they would not take the note without the interest on the money they had paid to *Charles*. This occurred in the latter part of the summer or in the early part of the fall of 1839. A witness swears that *Charles Shirley*, in the year 1839, held a note on *Monicle* for \$500. Another witness says that he heard *Jacob Shirley* tell *Monicle* in the harvest field, that if he, *Monicle*, would pay to him the money he had paid to *Charles Shirley* for the land, with interest, he might have the land. *Monicle* said he would determine by the next day, and *Jacob Shirley* said that if *Monicle* did not give his note to him, *Jacob Shirley*, he would buy a law suit. Witness says he was at *Shirley's* the next day, and *Monicle* did not come to *Shirley's*, &c. Two other witnesses, in other depositions, adopt the statements of the last named witness.

On the foregoing facts the Court, at the final hearing, dismissed the bill.

It has been seriously questioned whether the specific performance of a contract would be enforced, where both the parties were not bound to the performance of it by having signed the agreement, on the ground of a want of mutuality in the remedy. *Lawrenson v. Butler*, 1 Sch. and Lef., 13. The doubt however has been abandoned, and the Courts have, by numerous decisions, settled the doctrine that a contract signed by the party to be charged, according to the statute of frauds and perjuries, may be enforced by the other. *Flight v. Bolland*, 4 Russ., 298; *Palmer v. Scott*, 1 Russ. & Mylne, 391; *Martin v. Mitchell*, 2 Jac. & Walk., 419; *Ld. Ormond v. Anderson*, 2 Ball & Beat., 363.(1)

The contract between the vendor and the purchasers in this case, was evidently one where the acts to be performed by them were concurrent. The purchasers were to pay \$1,600 for the land, and the vendor was to make a [*455] *good title. There is nothing in the terms of the contract which shows that it was the intention of the

Shirley v. Shirley and Another.

vendor to convey before the payment of the purchase-money; and unless it clearly appeared that such was the contract, a Court of equity would not compel him to part with his land before he was paid for it. Nor would a Court compel the purchaser to pay his money before he received a title. Neither party, therefore, could compel a performance by the other until he had performed, or offered to perform, his part of the contract. It follows that neither party had a right to rescind the contract without the consent of the other, until by an offer to perform on his part, the other party had refused. If the purchasers had tendered the purchase-money within a reasonable time, and demanded a deed, and it had been refused, they might have considered the contract at an end; and so, if the vendor had tendered a deed and demanded the purchase-money, and it had not been paid, he might have considered the contract as rescinded. But if either party abandoned the contract without doing all that the law required of him, he is in default.

There is no evidence that *Charles Shirley* tendered a deed to the purchasers, and demanded the purchase-money, or anything equivalent to it, before he sold to *Monicle*. The sale, therefore, can not affect the equity of the complainants if *Monicle* had notice of it, and if they did no act which destroyed it. *Monicle* admits in his answer that, from a conversation he had with *J. Shirley* and *Hudelson* on the subject, he knew they had a claim on the land. In that conversation they consented that *Monicle* might purchase from *Charles Shirley*, but we think the weight of the testimony is that they informed *Monicle* that they would claim a lien on the land for the money they had paid with interest, and that unless *Monicle* would pay or secure to them that amount, they would seek to enforce their lien. That did not amount to an abandonment of their lien; it rather asserted it. *Monicle*, therefore, purchased with a full knowledge of the complainants' equity, and the land in his hands is subject to the lien claimed by the bill. A vendee has a lien on land purchased by him for the purchase-money, or any part of it, paid by him, if

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[*456] the vendor refuses to *convey, and this lien attaches to the land in the hands of a subsequent purchaser with notice. 1 Sugd. on Vend., 344; Coote on Mortg., 248, and cases cited.

From the view we have taken of the case, it follows that the Court erred in dismissing the bill.

The Court reversed the decree, and rendered a decree for the complainant conformably to the above opinion.

H. P. Thornton, J. Collins, W. Quarles, and J. H. Bradley, for the appellant.

W. A. Porter, for the appellees.

(1) The cases cited in the text show that Courts of equity consider contracts for the sale of land valid, under the statute of frauds, though signed only by the defendant. The doctrine is the same in Courts of law. *Laythoarp v. Bryant*, 2 Bingh. N. C., 735; *Barickman v. Kuykendall*, 6 Blackf., 21.

 WILCOX v. THE STATE, in Error.

AN indictment for gaming alleged that the defendant, by playing at cards, &c., had won from *A. H.*, *A. C.*, and *G. H.*, a certain article, &c. The evidence was that the winning was by the defendant and another, as partners, from *A. C.* and *G. H.*, as partners. *Held*, that the variance was fatal.

 BELL and Another v. THE STATE BANK.

ALTERATION OF NOTE—FILLING BLANKS.—A printed form of a promissory note, payable ninety days after date, at the Branch Bank at *Lafayette*, was signed by *A* and indorsed by *B*; blanks were left for the date, the payee's name, and the sum; and in the margin there was a printed direction to "credit the drawer," signed by *B*. The note, in this form, was submitted by *A* to said bank for the purpose of renewing a note of the same parties, in bank, about to become due. *A* not being prepared to pay the part of the debt required, the bank refused to renew at ninety days, but was willing to

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do so at thirty days. *A* being informed of this by the clerk of the bank, directed him to make the note payable in thirty days, which, without *B*'s consent, was accordingly done; the word ninety being struck out [*457] and thirty inserted in its place. The blanks were *filled, &c., the one for the date with the day when the old note fell due. Held that *B*, in consequence of the change thus made in the time of payment of the note, was not liable as indorser thereof.

NOTICE OF NON-PAYMENT.—If the indorser of a promissory note payable at bank at *A*, reside four or five miles from *A* in the country, and use the post office at *A*, it being as near his residence as any other, notice of the non-payment of the note may be given to him, by putting the notice into the post office at *A* directed to him there.(a)

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—The State Bank, the indorsee of a promissory note, brought a joint action of assumpsit against *Benbridge* the maker, and *Bell* the indorser thereof. The note, as described in the declaration, bears date *November 3d*, 1841, at *Lafayette*, and is for \$534 payable and negotiable at the Branch Bank at *Lafayette* in thirty days from date. Plea, the general issue by both defendants, and sworn to by *Bell*. Verdict for the plaintiff; motion for a new trial overruled; and judgment upon the verdict.

It appeared in evidence, that the note described in the declaration was originally a printed form of a ninety-day note, payable at the Branch Bank in *Lafayette*, and purporting to be drawn at that place, with blanks for the date, the name of the payee, and the sum to be paid. In this shape it was signed by *Benbridge* and indorsed by *Bell*, with a printed direction in the margin to "credit the drawer," also signed by *Bell*. This blank note was delivered to *Benbridge*, and by him submitted to the board of directors of the Branch Bank, for the purpose of renewing a ninety-day note between the same parties, which fell due on the 3d of *November*, 1841. As *Benbridge* was not prepared to pay the usual curtailment of the amount of the old note, the directors refused to renew at ninety days, but were willing to do so at thirty days. This determination was made known by the clerk of the bank to *Benbridge*, who directed the

(a) See note to *Sharp v. Drew*, 9 Ind., 281.

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clerk to make the note a thirty-day note; the blanks were filled up accordingly; and the word ninety in the blank note was stricken out, and thirty inserted in its place, making the note such as it is described in the declaration. *Bell* gave no consent to the change of the note from a ninety-day to a thirty-day note. It was also proved that when the note became payable, and on the last day of grace, a formal [*458] demand of payment was *made at the bank, and that, on the same day, notice of non-payment was put into the post office at *Lafayette* directed to *Bell* at that place; that *Bell* lived in the country from four to five miles from *Lafayette*, and about the same distance from *Columbia*, where there was also a post office; that ~~these~~ were the nearest post offices to the residence of *Bell*; and that *Bell* had been in the habit of using the post office at *Lafayette*.

The questions are, is *Bell* an indorser of the note described in the declaration? and if so, was the notice of non-payment sufficient?

With regard to *Benbridge's* liability, there is no doubt. He clearly gave authority to make the note what it is. But as this is a joint action against the maker and indorser (which the statute authorizes), the judgment must be reversed entirely, unless it is valid against both defendants.

The evidence does not present a case of the alteration of a perfected note, but raises a question of the due execution of an implied authority, arising from the indorsement of a note in an unfinished and imperfect state. The general rule of law certainly is, that if a person indorses or signs a blank paper or note, and delivers it to another person that he may raise money with it, he authorizes that other person to render him liable in any amount, and at any time, he may please. There is no restriction in the implied authority in such a case. *Russel v. Langstaffe*, Dougl., 514; *Collis v. Emmett*, 1 Hen. Bl., 313. It must be evident that the nearer the blank instrument approaches to perfection, the more restricted must be the authority; if the sum, date, or time of payment be inserted, they can not be changed.

In the case under consideration, the blank note was not indorsed by *Bell* for the purpose of enabling *Benbridge* to raise money upon it in the market, but that he might renew a note in bank between the same parties. We do not mean to say, that had *Benbridge* abused the trust reposed in him by filling up the note in a manner not contemplated by *Bell*, and by negotiating it, the purchaser, if ignorant of the improper conduct, could not have recovered against *Bell*. But the bank was apprized through its officers of the real object of the note, and, therefore, knew the extent of the implied [*459] *authority of *Benbridge* in regard to filling up the blanks. What was the extent of that authority? In our opinion it was limited to the right of using the note, so as to make it answer as a ninety-day note in the place of the note already held by the bank, and which became payable on the 3d of *November*, 1841. Such an authority as this certainly did not empower *Benbridge*, or the bank, to make the new note payable in thirty days from the time of the maturity of the old note, which was very properly made the date of the substitute. There were two certain restrictions of the implied authority of *Benbridge* apparent upon the face of the blank note; one had respect to the length of credit, and the other to the place of payment; and he had no more right to alter the first than the last. It will scarcely be contended he was authorized to change the place of payment.

Two cases are particularly relied upon by the defendant in error, to show that *Benbridge* had authority to make the note payable in thirty days from its date instead of ninety. The first is the *Mechanics' and Farmers' Bank v. Schuyler*, 7 Cowen, 337, in note. The promissory note on which that case was founded, was delivered by the indorser to the maker without any date; the maker antedated it so as to make it run nearly thirty days less than it would, had it been dated when it was made, and then negotiated it to the bank, which was ignorant of the circumstances stated. The indorser was held liable, on the ground that the bank was a *bona fide* indorsee without notice, and could not be affected by the abuse

(if any existed) of the implied authority of the maker in ante-dating the note. That case can have no application to this, for here the bank was apprised of all the circumstances, and was bound to know that the implied authority of *Benbridge* was exceeded. The other case referred to is *Mitchell v. Culver*, 7 Cowen, 336. The note in that case was intrusted by the indorser to the maker for the purpose of raising money upon it; there was a blank for the date, which was so filled up as considerably to shorten the time of payment; and this was done with the knowledge of the person who became the holder of the note. It was held, nevertheless, that he could recover against the indorser; that his knowledge of the ante-dating of the note made no difference. The ground of the decision was, that the indorser by intrusting the note, with a blank for the date, to the maker for the purpose of raising money upon it in the market, conferred upon him an implied authority to fill the blank as he might see fit. Under this view of the subject, it is evident that the knowledge of the holder of the ante-dating of the note by the maker could make no difference, for it was within his supposed authority to do so. But there is this marked difference between that case and the case under consideration. There, the general object of the note which was put in circulation was to raise money in the market; here, the object was very different; it was not contemplated by any of the parties that a new debt should be created upon the note intrusted to *Benbridge*, but all knew that its specific and only purpose was to effect a renewal of a ninety-day note in bank, by the substitution of a like note after the usual curtailment of the debt. The authority to *Benbridge* was to effect that object and no other—at least such was his authority when dealing with those acquainted with all the circumstances of the case. He had no right, and could confer none, to strike out ninety and insert thirty in the note. We are of opinion, therefore, that *Bell* is not the indorser of the note described in the declaration. The evidence did not authorize the verdict; there should have been a new trial.

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As to the question of notice, it was settled in *The Bank of Columbia v. Lawrence*, 1 Pet., 578, that where an indorser lived on a farm two or three miles from the nearest post office, a notice of non-payment put into that post office, and directed to the indorser at the town in which the post office was, was a legal notice. Upon the authority of that case, we think the notice in the present instance was sufficient.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiffs.

Z. Baird and R. C. Gregory, for the defendant.

[*461] *THE BOARD OF TRUSTEES FOR THE VINCENNES
UNIVERSITY v. EMBREE.

BILL OF EXCEPTIONS—PRACTICE.—The judges of the Circuit Court are not bound to seal a bill of exceptions, which requires the clerk to insert therein copies of certain papers after the bill shall have been sealed.

BLACKFORD, J.—This is a motion on the part of the plaintiffs for an order, requiring the judges of the *Gibson* Circuit Court to seal a certain bill of exceptions, or show cause, &c. The bill of exceptions presented to the judges to be sealed was as follows:

“*Gibson* Circuit Court, *March* term, 1845. *The Board of Trustees for the Vincennes University v. Elisha Embree*. Be it remembered, that on this fifth day of *March*, 1845, and on the third day of the *March* term of this Court, the plaintiffs moved the Court to grant a change of venue in this case to some county out of this circuit, and in support of such motion produced and read to the Court the following petition and affidavit, viz.: [The clerk will here insert the petition and affidavit of Mr. *Judah*, and the certificate of *George W. Rathbone*, notary public.] But the Court refused to grant said petition. To which refusal the plaintiffs, by their counsel,

Doe, on the Demise of Berry, v. Shaw, in Error.

excepted, and prayed that this their bill of exceptions be signed and sealed, &c., which is done, &c., the day and year aforesaid."

The judges refused to seal this bill of exceptions.

The provision in the statute on the subject is, that the exception shall be in writing; but the Court shall allow such time as may be deemed reasonable to settle and reduce the same to form. R. S., 1843, p. 733. The bill before us shows on its face that it is incomplete. It requires the clerk to insert copies of certain papers after it shall have been sealed. We think the judges are not bound to seal such a bill.

Per Curiam.—The motion is overruled.

[*462] *THE STATE v. LEAK and Others, in Error.

DEBT by the State on a judgment of the *Owen* Circuit Court obtained on a forfeited recognizance; the declaration not showing whether the recognizance had been taken in a civil or criminal case. *Held*, that a plea that the debt had been remitted by the Governor, must show that the forfeiture had been incurred in proceedings arising out of a violation of the penal laws.

If in debt payment of the whole be pleaded and issue be joined on the plea, the whole and not a part of the issue should be tried.

DOE, on the Demise of BERRY, v. SHAW, in Error.

THE judgment for the defendant in this case was affirmed on the authority of *Clawson v. Doe d. Moore et ux.*, 5 Blackf., 300, in point.

Harding v. Griffin.

HARDING v. GRIFFIN.

BOND FOR COSTS—PRACTICE.—The refusal to dismiss the suit of a non-resident plaintiff for the insufficiency of a bond for costs, is not error of which the defendant can complain, if *his* costs are secured by the bond.

SET-OFF—PRACTICE.—A defendant in assumpsit, who pleads the general issue with notice of set-off, and furnishes a bill of particulars of the matters of set-off, is confined in his proof to the bill of particulars.

SAME.—Under a general charge, in such bill, of cash to a certain amount, the defendant will not be permitted to prove that, in the capacity of executor, he had overpaid the plaintiff a legacy left him by the defendant's testator.

ERROR to the *Marion* Circuit Court.

DEWEY, J.—Assumpsit. The plaintiff, being a non-resident and having been ruled to give security for the costs, [*463] filed a *bond conditioned that she "should pay all costs which she should be adjudged to pay to the defendant, or to the officers of Court." The defendant moved the Court to dismiss the action for the want of a sufficient bond. The motion was overruled. The declaration contained the common counts. Among other pleas, the defendant pleaded the general issue, with notice of set-off. The notice was in general terms, containing the substance of the common counts of a declaration. The defendant's bill of particulars, furnished at the request of the plaintiff, contained the following item, viz.: "*October 11th, 1837, cash, \$100.*" Trial by the Court, and judgment for the plaintiff.

On the trial, the defendant offered in evidence a receipt dated *October 11th, 1837*, and signed by the plaintiff, by which she acknowledged that she had received of the defendant, as the executor of one *Holmes*, \$100, part of a legacy left her by *Holmes*. The object of the defendant was to show, by the receipt and other evidence, that he had overpaid to the plaintiff the legacy given her by *Holmes*, to the amount contained in the receipt. The plaintiff objected to the receipt, and it was excluded.

The errors assigned are the overruling the motion to dismiss

the action for want of security for the costs, and the rejection of the receipt as evidence.

As to the first point, the statute requires suits commenced by non-residents to be dismissed unless the plaintiff shall file a bond with surety, conditioned for the payment "of all costs which may accrue in the action, either to the defendant or the officers of the Court." R. S., 1843, p. 675. We have decided, under a similar statute, that a bond which stipulated that the plaintiff should pay the costs which might accrue in the cause, "provided judgment should be given against him," was insufficient, and that the action was properly dismissed for that reason. *Hunt v. Butcher*, 5 Blackf., 341. We see no material difference between the bond in that case and the one under consideration. Neither afforded any security to the officers of the Court for their fees in the event of the suit's resulting in favour of the plaintiff. One object of both statutes was to make the officers secure, let the action terminate as it [*464] might. It would have been proper *had the Circuit Court dismissed this action, because the bond did not effect that object. But we do not think the refusal to do so is an error of which the defendant can complain. His costs were amply secured by the bond; he, therefore, sustained no injury by the decision of the Circuit Court.

As to the other point, we do not think the rejection of the receipt as evidence was erroneous. The defendant's legal evidence was confined to his bill of particulars, which was in the form of an account between the parties, individually; and the charge of \$100, on the 11th of *October*, 1837, was an item of that account; it purported to be an ordinary charge of cash by one individual against another. The receipt was a link in a proposed chain of evidence having for its object to show that the defendant, in the capacity of executor, had overpaid the plaintiff a legacy left her by the testator represented by the defendant. The general charge of \$100 cash, in the bill of particulars was not calculated to apprise the plaintiff of such a design, and to induce her to be prepared with such rebutting testimony as might have been in her power.

Loyd and Another v. Marvin and Another.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs.

O. H. Smith, H. O'Neal, and S. Yandes, for the plaintiff.

W. W. Wick and L. Barbour, for the defendant.

LOYD and Another v. MARVIN and Another.

INDEMNIFYING BOND.—A bond conditioned to indemnify the obligee and save him harmless from the operation of certain judgments which were liens on land purchased by him, is a bond of indemnity against damages arising from the judgments.(a)

SAME—PLEADING.—In debt on the penal part of such bond, a plea (*oyer* of the condition having been given) of *non damnificatus* generally is good.

SAME—BREACH OF CONDITION.—A replication to the plea in such case that executions were issued on the judgments and levied on the land, and that the rents and profits thereof for seven years were offered for sale, does not show a breach of the condition of the bond, and is therefore insufficient.

[*465] *APPEAL from the *Tippecanoe* Circuit Court.

DEWEY, J.—Debt upon the penal part of an obligation. *Oyer* having been granted, it appeared that the condition of the bond, after reciting the purchase by the obligees (the plaintiffs below) from *Brown*, one of the defendants, of certain town lots, which were incumbered by judgments against *Brown*, was, that “should said *Brown* indemnify the said *John* and *Allen Loyd* (the plaintiffs), and save them perfectly free and harmless from the operation of said judgments, by virtue of the liens thereof, then the obligation to be void,” &c. The defendants pleaded generally *non damnificatus*. The plaintiffs replied, that executions were issued upon the judgments and placed in the sheriff’s hands, who levied them upon the town lots purchased by the plaintiffs of *Brown*, advertised the lots for sale, and, on the appointed day, offered for sale the rents and profits thereof for seven years. A general demurrer to the replication was sustained, and final judgment rendered in favour of the defendants.

(a *Johnson v. Britton*, 23 Ind., 105; 9 Id., 443.

Ward and Another v. Leviston.

The correctness of this decision depends upon the real character of the bond given in *oyer*. If the condition be for the performance or non-performance of some specific act, as the extinguishment of the liens of the judgments, or that no executions should be levied upon the lots, the general plea of *non damnificatus* was not sufficient, *Holmes v. Rhodes*, 1 B. & P., 638; but if the bond be a mere bond of indemnity, that plea is allowable. 1 Will. Saund., 117, n.; *Coombs v. Newlon et al.*, 4 Blackf., 120. and note. We view it to be, in effect, a bond to save the plaintiffs harmless from all damages arising from the judgments mentioned in the condition. The plea, therefore, meets the case, and is a good bar. The replication is insufficient, because it fails to state any damages sustained by the plaintiffs. The issuing executions, levying them upon the lots, and offering the rents and profits for sale, were no injury to the plaintiffs. These acts did not disturb their possession, nor affect their title, any more than it was affected by the liens of the judgments, and if they were a violation of the bond, it was broken as soon as executed. We do not conceive that such was the intention of the parties. Had the lots been sold on the executions, or the plaintiffs had paid the judgments to prevent the sale, they would have had a good cause of action. As the matter stands, they can not maintain the suit. The condition of the bond has not been broken.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, for the appellants.

J. Pettit, for the appellees.

WARD and Another v. LEVISTON.

PARTNERSHIP, PRIVATE DEALING OF PARTNER.—If *B*, a member of a firm, deal in his own name in business of the firm with *A*, who is ignorant of the partnership, the latter may be sued for a demand against him, arising from such dealing, either by *B* alone or by the firm.

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SAME—SET-OFF.—And in a suit by the firm for such demand, *A*'s right of set-off is the same as if *B* had sued alone.

APPEAL from the Union Circuit Court.

DEWEY, J.—*Dormire* and *Ward* sued *Leviston*, in assumpsit, before a justice of the peace. The statement of their demand was an account in their favour against *Leviston* for boots, shoes, &c., commencing in 1839 and ending in 1842, amounting to \$64.87. No plea was filed before the justice; but in the Circuit Court, on appeal, the defendant pleaded that, before and at the time of making the account sued for, he held a note against *Dormire* for \$50.00, which was still due; that previously to any partnership between the plaintiffs, the defendant "had a running account with *Dormire*, which was to have been settled by a credit on the note;" that without any notice of the partnership, the defendant continued to deal, as usual, with *Dormire* alone. A general demurrer to the plea was overruled. Final judgment for the defendant.

The plea raises the question whether a firm, one of whose members has dealt in his own name, but in a matter in which his co-partners were interested, with a person who had no knowledge of the partnership, can maintain an action against that person on account of such dealing? If a joint [*467] *suit can not be maintained, the plea, as amounting to the general issue, was a good bar to the action, under a general demurrer, and the decision of the Circuit Court was correct. But we think that, in such cases, the action may be either by the firm, or by the partner who made the contract. *Skinner et al. v. Stocks*, 4 Barn. & Ald., 437. The plea, therefore, was not even an argumentative denial of the right to sustain the joint action, and the demurrer should have been overruled.

If *Ward* was a dormant partner of *Dormire's*, unknown to the defendant, who supposed when he took up the articles sued for that he was dealing exclusively with *Dormire*, the joint form of the action would not prevent him from availing himself of any matter of set-off which he held against *Dormire* alone. If concealed partners suffer one of the firm to conduct

The State v. Gooch.

their business, as the only person ostensibly concerned in the matter, they subject themselves, in a joint action, to the same right of set-off by the defendant, which he would have had in a several action by the partner with whom he dealt. *Stracey et al. v. Deey*, 7 T. R., 357, n.; *George v. Clagett*, id., 355. The plea under consideration, however, has neither the form nor substance of a plea of set-off.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman and *J. B. Sleeth*, for the appellants.

J. Perry and *J. S. Reid*, for the appellee.

BRADBURY v. DOUGHERTY, in Error.

THE refusal to continue a cause on account of the absence of a witness, if the continuance be applied for on a sufficient affidavit, is error. *Vanblaricum v. Ward*, 1 Blackf., 50.

The execution-defendant is a competent witness for the claimant, on a trial of the right of property. *Hankins et al. v. Ingols*, 4 Blackf., 35.

[*468] *The circumstance that a person has executed an appeal-bond in the name of the plaintiff and as his attorney in fact, in the case of an appeal from a justice's judgment, does not render him incompetent as a witness for the plaintiff, on the trial of the cause in the Circuit Court.

THE STATE v. GOOCH.

FORNICATION—INDICTMENT.—An indictment against an unmarried man for living in open and notorious fornication with a certain woman, need not aver that she is unmarried.(a)

(a) *State v. Shoemaker*, 4 Ind., 193.

ERROR to the *Morgan* Circuit Court.

SULLIVAN, J.—The defendant was indicted for living in open and notorious fornication with one *Sarah Lang*, he being an unmarried man. Whether *S. L.* was married or unmarried, does not appear by any distinct averment in the indictment. The Court, we are informed, quashed the indictment because it did not aver that she was an unmarried woman.

On this question we admit there is some room for doubt, but our conclusion is, that the Court should not have quashed the indictment. It is not necessary that an indictment should negative every conceivable fact that may change the character of an offense. If, in the present case, the guilty accomplice of the defendant were a married woman, it would be a matter of which the defendant could avail himself on the trial, and, by proving her married, be acquitted of the charge of fornication. We think the objection rests entirely in proof, and that the defendant should have been required to plead to the indictment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Watts, for the State.

C. C. Nave, for the defendant.

[*469] *SPARKS and Others v. THE STATE BANK.

STATE BANK—CHARTER CONSTRUED.—A note and mortgage appearing on their face to be executed to the State Bank in its corporate name, will be presumed to have been taken in conformity with the charter of the bank, until the contrary be shown.(a)

SAME.—The bank, by the 6th section of the charter, may hold real estate which shall have been mortgaged to it by way of security for money due to it on a promissory note, executed on the same day with the mortgage.

FIXTURES.—A steam engine erected in a permanent manner in a tan yard to facilitate the process of tanning, and used there for such purpose for two or

(a) *Hamilton v. The New Castle, &c., Co.*, 9 Ind., 339

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three years, but which could be removed without injury to the building with which it was connected by braces,—was held to be a fixture, and to pass, by a mortgage of the land on which it was erected, to the mortgagee. (a)

RECORDING OF MORTGAGE.—A subsequent mortgage of real estate, though first recorded, will not prevail against a prior one which is not recorded in time, if the subsequent mortgagee had actual notice of the prior mortgage.

SAME.—If a judgment be obtained against a person subsequently to his execution of a mortgage, but before the mortgage is recorded, the mortgage though it was not recorded in time will have the preference. But, perhaps, a *bona fide* purchaser at sheriff's sale under the judgment might be protected by the statute. (b)

ERROR to the Dearborn Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed by the *State Bank of Indiana* against *William S. Durbin, Eliza Durbin, Willis Peak, George Roberts, The Lawrenceburgh Insurance Company, Jacob Hayes, Enoch D. John, Green Sparks, and Norval Sparks*.

The bill states that on the 24th of *January, 1840, Durbin* became indebted to the complainant, by a promissory note of that date, in the sum of \$6,000; and that on the same day, *Durbin* and his wife, to secure the payment of the debt, executed a mortgage to the complainant, and “thereby granted, bargained, sold and conveyed to the complainant and assigns the following described real estate, to wit, that tract or parcel of ground lying in the county of *Dearborn*, and State of *Indiana*, and bounded as follows, to wit, beginning,” &c. (The boundaries of the land are here set out.) “To have and to hold the premises hereby bargained and sold or meant or intended so to be, with the appurtenances,” to the complainant and its assigns forever. And the debt is averred to be unpaid.

The bill further states, that in *April, 1840, Durbin* [*470] executed a mortgage of a portion of *the appurtenances situate on the land before mortgaged to the complainant, viz., of an engine of the value of \$1,000, to said defendants *Norval and Green Sparks, and Enoch D. John*, and to two other persons who are not made defendants; these

(a) *Millikin v. Armstrong*, 17 Ind., 456.

(b) *The Bond, &c., v. Wilson*, 1 Ind., 356; 8 Blackf., 420.

mortgagees having full knowledge of the complainant's mortgage. The bill further states that in *April*, 1840, *Hayes* recovered a judgment against *Durbin* for \$936; that in *April*, 1841, *Peak* and *Roberts* recovered a judgment against *Durbin* and others for \$2,517.90; and that in —, *The Lawrenceburgh Insurance Company* recovered a judgment against *Durbin* for the sum of —. Prayer that the equity of redemption in the premises mortgaged to the complainant be foreclosed, and that the premises be sold, &c.

The bill was taken as confessed against *Durbin* and wife, and *The Lawrenceburgh Insurance Company*. The other defendants filed their answers.

In consequence of the blanks in the bill relative to the judgment in favour of *The Lawrenceburgh Insurance Company*, the case stands as if that company were not a party to the suit. *Durbin* having been declared a bankrupt pending the suit, his assignee was made a defendant. The execution of the promissory note and of the mortgages aforesaid, and the rendition of the said judgments, are not disputed. The mortgage to the complainant was not recorded until the 14th of *October*, 1841. The mortgage to the *Sparkses*, *John*, and others, was recorded on the 21st of *May*, 1840. The *Sparkses* and *John* admit that, previously to the execution of the mortgage to them, they had notice of the mortgage to the complainant.

The facts relative to the engine described in the mortgage to the *Sparkses*, *John*, and others, are substantially as follows: There were on the premises mortgaged to the complainant, at the date of the mortgage, and had been for several years previously, a tan yard, bark mill, &c. Two or three years before the date of that mortgage, *Durbin*, the owner of the property, and who had previously ground the bark there by horse power, erected on the premises a steam engine (the engine described in the second mortgage), to aid in grinding bark, and to [*471] facilitate the process of tanning. *The engine and boiler used for said purposes since their erection are placed on a stone foundation, and there is a large brick chimney at one end of the boiler. The engine is put up like other

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similar engines in a permanent manner; but it might be removed without injury to the building with which it is connected by braces.

The Circuit Court decreed that the equity of redemption in the premises mortgaged to the complainant be foreclosed, and the premises, including the engine, &c., be sold, &c.

The first objection made to the decree is that the note and mortgage to the complainant are void, it not appearing that they were received by the bank through the agency of one of its branches. This objection is not tenable. The note and mortgage appear on their face to be executed to the bank in its corporate name, and if they were not taken in the mode prescribed by the charter, the defendants must show that fact.

It is contended that the bank had no authority to receive this mortgage. The sixth section of the charter gives the bank a right to hold real estate which shall have been mortgaged to it by way of security for money due. The proviso in this mortgage is, "that if the party of the first part, his heirs, &c., shall well and truly pay to the party of the second part, or its assigns, the sum of \$6,000, according to the tenor and effect of a certain note this day made by said *Durbin*," &c. The real estate in question, therefore, appears to have been mortgaged to the complainant to secure the payment of money due to it; and the mortgage is authorized by the charter.

The defendants who claim under the second mortgage contend that the engine mortgaged to them is personal property, and did not, therefore, pass to the complainant by the first mortgage; but we are of a different opinion. The engine is a fixture and a part of the freehold. The rule on the subject as between heir and executor, vendor and vendee, and mortgagor and mortgagee, is the same. In all such cases, fixtures like the engine in question pass with the land, though erected for the purposes of trade. *Miller v. Plumb*, 6 Cowen, 665; *Colegrave v. Dias Santos*, 2 Barn. & Cress., 76; *Goddard* [*472] *v. Chase*, 7 Mass., 432; *The Pres., Direct., *and Co. of the U. Bank v. Emerson*, 15 Mass., 159; *Noble v. Bosworth*, 19 Pick., 314; *Taffe v. Warnick*, 3 Blackf., 111.

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These defendants claiming under the second mortgage contend further that, admitting the engine to be part of the freehold, still as their mortgage was first recorded, and that to the complainant not recorded in time, they have the prior claim. But that ground is not tenable, as they had notice of the first mortgage before the execution of the mortgage to them. *Ricks v. Doe*, 2 Blackf., 346.

The claim of the other defendants, who have judgments against *Durbin* obtained subsequently to the mortgage to the complainant, but before it was recorded, must yield to that mortgage, though it was not recorded in time. A mortgage of real estate, though not recorded in season, is a valid conveyance, except so far as its validity may be affected by statute; and the statute on the subject renders such conveyances not recorded in time void only as to subsequent purchasers and mortgagees for value, whose deeds are first recorded. It has no relation to judgment-creditors. Perhaps a *bona fide* purchaser at sheriff's sale under such judgment might be protected by the statute, but that is a different case. 4 Kent's Comm., 173.

Per Curiam.—The decree is affirmed with costs.

A. Lane, for the plaintiffs.

D. Macy, for the defendant.

 SHIPLEY and Another v. MITCHELL.

EQUITY—PRACTICE.—If a bill in equity be taken as confessed on account of the non-appearance of the defendant, and a final decree be rendered against him, the record should show that the Court had jurisdiction of the person of the defendant.

SAME—NON-RESIDENT—NOTICE.—When such bill was filed in vacation against a non-resident defendant, it was necessary, under the act of 1838, to give notice of the pendency of the suit, in a public newspaper, for three full weeks and sixty days before the next term of the Court.(a)

(a) *Henderson v. Dennison*, 1 Ind., 152.

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ERROR to the Warren Circuit Court.

DEWEY, J.—This was a bill in equity against non-resident defendants. The bill, together with an affidavit of [*473] the *non-residence of the defendants, was filed in the clerk's office on the 6th of *July*, 1842, though the affidavit bears date on the 13th of *June* of that year. The order of publication was made by the clerk on the former day, and recites the filing of the bill and affidavit on that day. At the next term of the Circuit Court, commencing on the 22d of *September*, the defendants were defaulted, the bill taken as confessed, and a final decree rendered against the defendants.

When a bill is taken as confessed on account of the non-appearance of the defendant, and a final decree rendered against him, the record should show that the Court, rendering the decree, had jurisdiction of the person of the defendant. It must of course appear, if he be a non-resident, that due publication of the pendency of the suit was made. The statute in force when this bill was brought, required notice of the action (the bill being filed in vacation) in some public newspaper "for three successive weeks," at least sixty days before the next term of the Court, to authorize the Court to take cognizance of the cause at that term. R. S., 1838, p. 444. It is indeed stated in the record, that there was proof "to the satisfaction of the Court," that publication of the pendency of the action was duly made in a certain newspaper, more than sixty days before the commencement of the term at which the decree was rendered, but the proof itself is not given. It is contended by the defendant in error, that all the statute requires is the insertion of the order of publication in three successive weekly papers, and that the time contemplated expires at the date of the last insertion. If this construction be correct, legal notice of the pendency of the bill might have been given, and we are bound to presume from the statement of the record that it was given. But if, as the plaintiffs in error contend, the act requires the newspaper notice to continue for the space of three full weeks before the commencement of the sixty days, legal publication could not have been made,

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and the Circuit Court was improperly satisfied that it had been; for supposing the first insertion in the newspaper to have been made on the day on which the bill and affidavit were filed—the 6th of *July*—three weeks and sixty days could not have intervened between that day and the first day of the next subsequent *term, the 22d of *September*, at which term the decree was rendered. We are inclined to adopt this latter construction, for, according to the other interpretation, if the statute had required a publication in a newspaper for one week, its terms would have been complied with on the very day of publishing the paper. It is only by reckoning the first day of the publication as one week, that three weeks can be made to end at the date of the third insertion. We do not think the language of the act can be satisfied by such a construction, and are of the opinion that the design of the Legislature was, that three weeks from the date of the first insertion should elapse before the beginning of the sixty days. It follows that the defendants had not legal notice of the pendency of the bill; and that the Circuit Court had no right to take jurisdiction of the cause.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

O. H. Smith, for the plaintiffs.

R. A. Chandler, for the defendant.

ANDREWS v. RUSSELL and Another.

INTEREST—USURY.—The act of 1843 respecting interest, which declares that usurious contracts shall not be void, &c., embraces contracts made before as well as those made after its passage, and is constitutional.(a)

ERROR to the Shelby Circuit Court.

DEWEY, J.—Assumpsit by the payees against the maker of

(a) *Walpole v. Elliott*, 18 Ind., 258; 16 Id., 84; 9 Id., 67; 8 Id., 545; 6 Id., 501; 2 Id., 486; 1 Id., 32; 8 Blackf., 67, 371.

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a promissory note, dated in *May*, 1840, for \$1,204.50, payable in six months. Plea, the general issue. On the trial, the plaintiffs gave in evidence the note described in the declaration; whereupon it was agreed by the parties that the consideration of the note was a debt of \$1,095, due from the maker to the payees; and that the sum of \$109.50 was included in the note as interest for the forbearance of the debt for six months, being at the rate of twenty *per cent. per annum*, making [*475] the aggregate as *expressed on the face of the note. The cause was submitted to the Court. Judgment for the plaintiffs for \$1,095; and for the defendant for the costs.

In *Fowler v. Throckmorton*, 6 Blackf., 326, this Court decided that an action could not be sustained on a writing obligatory for the payment of a certain sum of money, a part of which was illegal interest, on the ground that the statute of 1838, which forbade the reception of, or agreement for, usury, rendered the contract void. The same statute was in force at the date of the promissory note on which this action is founded. Since the above-mentioned decision was made, the Legislature has passed an act by which it is provided that usurious contracts shall not be void, but that in actions upon them, the plaintiff shall recover the principal sum without interest; and that the defendant shall recover costs. R. S., 1843, p. 581, sect. 29. This statute we construe to include contracts made before, as well as those made after its passage. The judgment of the Circuit Court conforms to it, and is valid, unless the law itself, so far as it respects pre-existing contracts, is void. This depends upon the constitutional right of the Legislature to pass a retrospective statute.

The only provisions in the constitution of the *United States*, or in the constitution of this State, restrictive of the power of the Legislature to enact laws operating upon past transactions, are those which forbid the passage of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts.

The first prohibition is too evidently out of the question on the present occasion, to need comment.

The phrase *ex post facto* is technical, and has relation only to criminal laws; it does not embrace statutes respecting private rights, or civil remedies. *Calder v. Bull*, 3 Dall., 386; *Strong v. The State*, 1 Blackf., 193. It has, therefore, no bearing upon the law under consideration.

Nor is the obligation of any contract impaired by this statute; on the contrary, its object is to give force and obligation to contracts which, before its passage, were illegal and void. It is retrospective, certainly; but that it is not unconstitutional for that reason is too well established to be questioned. *Beach v. Woodhull*, Pet. C. C. Rep., 2. A [*476] Court *of Probate in *Connecticut* made a decree disapproving a will, in consequence of which the right of the heir at law to the devised premises remained unimpaired. The Legislature of that State passed a law setting aside the decree and ordering a new trial. The will was finally established, and the devisee held the property. The Supreme Court of the *United States* decided the law to be constitutional. *Calder v. Bull*, *supra*. Two persons held land in common, in *Pennsylvania*, under what was called a *Connecticut* title. They made partition and became mutual tenants to each other under leases. In an action of ejectment respecting some of the premises thus leased, the Supreme Court of *Pennsylvania* decided, that the relation of landlord and tenant could not exist between persons holding under a *Connecticut* title. The Legislature subsequently passed a law that the relation of landlord and tenant did and should exist between such persons. It was held by the Supreme Court of the *United States* that the law was constitutional. *Satterlee v. Matthewson*, 2 Pet., 380. A person died in *New Hampshire* seised of real estate in *Rhode Island*; he devised that property to his daughter. His will was proved by his executrix in *New Hampshire*, and a license to sell his real estate to pay debts, was procured from a Court of Probate there. Under that license and for that purpose, the executrix sold the land in *Rhode Island*, and executed a deed to the purchaser. The Legislature of that State passed a law confirming the title in

the purchaser. It was decided that the law was constitutional; and that it gave validity to the deed which was otherwise null and void. *Wilkinson v. Leland et al.*, 2 Pet., 627.

Thus, we see that retrospective laws are not necessarily unconstitutional. That it is, in general, inexpedient and injurious to the public interest to pass them is not to be questioned. But a state of things may, and sometimes does exist, which renders retrospective legislation desirable, and highly equitable in its effects; and we can not but think that such a crisis demanded the passage of the law which we have been considering. For more than thirty years prior to 1831, usurious contracts were expressly declared by law to be valid for the principal sum, and void only as to the interest; and though from that period the saving clause was repealed, [*477] the effect of the repeal upon the validity of the contract was not judicially settled until the decision of the case of *Fowler v. Throckmorton*, *supra*, in 1842. In the meantime, it is reasonable to suppose, many usurious contracts had been made under the belief that nothing but the interest was jeopardized—contracts which never would have existed had the public been apprised of the real state of the law. Under these circumstances, we think the law can be vindicated on the score of sound policy and justice, as well as on that of constitutionality.

We have said that the only provisions in the Federal or State constitution, restrictive of the power of the Legislature to enact a retrospective law, are those before mentioned. We do not, however, mean to say that a retrospective law may not be void though it violate no express prohibition. There are certain absolute rights, and the right of property is among them, which, in all free governments, must of necessity be protected from legislative interference, irrespective of constitutional checks and guards.

Per Curiam.—The judgment is affirmed with five per cent. damages and costs.

W. Herod, for the plaintiff.

W. Quarles and *J. H. Bradley*, for the defendants.

Smith v. Buskirk.

SMITH v. BUSKIRK.

PAYMENT, PRESUMPTION OF.—Suit on a bond. Plea, payment. *Held*, that the plaintiff, to rebut the presumption of payment from lapse of time, might prove that, pending the suit, the defendant proposed to the plaintiff's attorney to pay the bond in property.

ERROR to the *Monroe* Circuit Court.

BLACKFORD, J.—This was an action of covenant, commenced by *Smith*, assignee of *Thomas C. Childs* and Co., against *Michael* and *John S. Buskirk*, in *October*, 1839. The suit was founded on a bond, executed to the assignors, for the payment of \$258.81 in good merchantable hatters' fur. The [*478] bond was dated in 1815, and *payable nine months after date. Breach, that the defendants had not delivered the fur nor paid the money. The writ was returned "not found" as to *John S. Buskirk*. The defendant, *Michael Buskirk*, pleaded payment to the obligees in hatters' fur, according to the covenant. Replication in denial of the plea. The parties agreed that any matter might be proved under the plea, which could be specially pleaded as payment or accord and satisfaction, and that the same might be rebutted by evidence. Verdict for the defendant; motion for a new trial overruled; and judgment on the verdict.

On the trial, the plaintiff, to rebut the presumption of payment arising from lapse of time, examined a witness who stated that the bond sued on was placed in his hands for collection; that he had had two conversations with the defendant, *Michael Buskirk*, in regard to it, one before the suit was commenced, the other afterwards; that in one of those conversations, *Buskirk* proposed to pay the bond in horses or land or both. This testimony, on the defendant's motion, was rejected on the ground that it proved a proposition of compromise.

The plaintiff also read a deposition which is substantially as follows: About the 1st of *August*, 1840, the deponent was passing through *Bloomington*, and saw *Michael Buskirk*; and having been requested by *Mr. Smith* to ascertain what had been

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done between *Smith* and him, *Buskirk*, the deponent asked him, *Buskirk*, if anything had been done. He answered no, that he had had the suit put off for the want of some witness, by whom he expected to prove that there should have been more credits on the note. He then observed, "I suppose you have understood the proposition I have made. I proposed to pay the note off in land, and could then do it if *Smith* would take it." The deponent told him he did not think it would suit *Smith*. He then observed, that if he had to pay it in money, he would keep it off as long as he could. The deponent heard nothing from *Buskirk*, intimating that he had offered the land for the purpose of making a compromise. The defendant moved the Court to instruct the jury to disregard this deposition, on the ground that it showed a proposition to compromise; and the Court accordingly instructed the jury [*479] to disregard it, except these words, viz.: *"*He then observed that if he had to pay it in money, he would keep it off as long as he could.*"

We think the Court erred in their decision on these motions. It is said that if *A* sue *B* for £100, and *B* offer to pay him £20, it shall not be received in evidence; for this *neither admits nor ascertains any debt*, and is no more than saying he would give £20 to get rid of the action. Bull. N. P., 236. But the case before us is different. The evidence of the witness, and the part of the deposition rejected, by proving an offer to pay the bond sued on in property, both show an admission of the existence of the debt, and are consequently admissible to rebut the presumption relied on by the defendant.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. P. Hester, for the plaintiff.

J. S. Watts, for the defendant.

 Link v. Clemmens.

LINK v. CLEMMENS.

SUNDAY—CONTRACT.—A replevin-bond executed on *Sunday* is void; its execution being in violation of the statute which prohibits common labour on that day.^(a)

SAME—REPLEVIN.—Where goods were replevied on *Saturday*, and the statute required the replevin-bond to be executed within twenty-four hours after the replevy, it was held that *Sunday*, in such case, should not be counted.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—*Clemmens*, as assignee of the sheriff of *Decatur* county, brought an action of debt against *Link* and others on a replevin-bond. The bond is dated on the 10th of *October*, (*Saturday*), 1840. First plea: That the said writing obligatory was not made and executed on the day the same bears date; but it was signed, sealed and delivered on the 11th of *October*, 1840, which last mentioned day was the first day of the week, commonly called *Sunday*; wherefore the said writing obligatory is void. Second plea: There is no record of the supposed judgment in the declaration mentioned, remaining in said Court, &c. General demurrer to [*480] *the first plea, and the demurrer sustained. Repliation to the second plea, that there is such record of the judgment, &c. The cause was submitted to the Court, and judgment rendered for the plaintiff.

The main question in this cause is, whether or not a replevin-bond executed on *Sunday* is void?

The statute enacts that if any person shall be found on the first day of the week, commonly called *Sunday*, rioting, hunting, fishing, quarreling, or at common labour, works of necessity and charity only excepted, shall be fined, &c. There is a proviso to the statute, but it does not affect this case. R. S., 1838, p. 219.(1) We think the executing of this bond comes within the terms "common labour," and is a violation of the statute. That being the case, the bond must be considered void, as being a contract prohibited by law.

(a) *Lore v. Wells*, 25 Ind. 503; 13 Id., 203; 4 Id., 619.

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In this case the goods were replevied on *Saturday*, and the statute required the replevin-bond to be executed within twenty-four hours after the replevy, R. S., 1838, p. 476; but *Sunday*, in such case, would not be counted. See *Solomons v. Freeman*, 4 T. R., 557.

The demurrer to the first plea should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. H. Dunn, for the plaintiff.

J. Dumont, for the defendant.

(1) The *English* statute is different. It enacts that no tradesman, artificer, workman, labourer, or other person whatever, shall do or exercise any worldly labour or business, or work of their ordinary callings, upon the Lord's day, (works of necessity or charity only excepted.) 29 Car., 2. It is held that a farmer is not within the meaning of that statute; and that if he were, his hiring of a servant for a year is not work done in his ordinary calling. *Rex v. Whitnash*, 7 B. & C., 596. So, it is held that the statute does not apply to an attorney; and that if it did, his agreement to be personally responsible for the debt of his client, is not a matter within his ordinary calling. *Peate v. Dicken*, 5 Tyrw., 116.

[*481] *CONARD and Others v. DOWLING.

PROMISSORY NOTE—PLEADING.—A plea to a suit on a promissory note relied on the plaintiff's non-performance of a certain agreement set out in the plea. The replication described the agreement, which differed materially from that stated in the plea. *Held*, on general demurrer, that the replication was valid; it being a substantial denial of the plea.

SAME.—A rejoinder professing to be to the whole of said replication, but only attempting to answer an immaterial part, was held to be bad.

SAME.—A plea professing to answer the whole declaration, and attempting to answer only one of the counts, is bad in substance.

RESTRAINT OF BUSINESS—PLEADING.—To a suit on a promissory note, the defendant pleaded that the note sued on, and other notes, &c., were given in payment for the "Wabash Courier" newspaper and printing establishment, &c., at *Terre Haute*; that in further consideration of said notes, it was agreed by the plaintiff that no newspaper or printing office should be established by him, or by any person for him, within fifty miles of that place; that one *T. D.*, who, at the time of the sale, owned one-half of said prop-

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erty, had since the sale established, and continued to publish, a newspaper called "The Wabash Express" in *Terre Haute*; that the plaintiff, at the time of establishing the paper, and since, aided the said *T. D.* in establishing and continuing it, and, in fraud of his agreement, aided in diverting the patronage of the newspaper and establishment, sold as aforesaid, from the same; that by his aid and procurement, and in combination with said *T. D.*, the same was diverted and withdrawn from the "Wabash Courier," and transferred to "The Wabash Express;" to the injury, &c. *Held*, that the plea was insufficient.

ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—*John Dowling* brought an action of assumpsit against *Jesse Conard* and others. The declaration contains two counts. The first is on a promissory note dated the 9th of *September*, 1841, for \$700, payable two years after date. The second is for money paid, money lent, and money had and received. There are six pleas in bar.

The first plea is non assumpsit to the second count.

The second plea, which is to the first count, is substantially as follows: That on the 9th of *September*, 1841, the plaintiff sold the defendants, *Conard* and *Harris*, his title and interest in the "Wabash Courier" newspaper and printing establishment at *Terre Haute*, embracing the whole claim to the patronage, &c., for \$5.00 in hand, and the further sum of \$2,000; for the payment of which last-mentioned sum, *Conard* and *Harris* executed to the plaintiff their eight several [*482] promissory notes for \$100 each, dated the day *and year aforesaid, and payable twelve months after date, also one other note for \$200 of the same date and payable at the same time, also one other note for \$300 payable to *Jenks* and others two years after date and indorsed by the payees, also the note described in the first count of the declaration; that as a full and further consideration for said notes, the plaintiff agreed to give *Conard* and *Harris*, at or before the time when the notes or any of them became due, a complete title to said property, clear of any claim, incumbrance, or lien of any person; that the plaintiff did not give *Conard* and *Harris* a title to said property clear of any claim, incumbrance, or lien, on or before the time when the first note or

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any of the notes became due, nor has he given them such title since; but that *Richard Blake* and others (naming them), when the notes became due, held and still hold a mortgage, &c., on an undivided half of said property for the sum of \$1,200, which is unpaid; and that therefore the consideration of the note sued on has wholly failed.

Replication to the second plea: That by the agreement made between the plaintiff and *Conard* and *Harris* for the sale of the property specified in the plea, the plaintiff stipulated and agreed as a part thereof, that he would indemnify and defend and save harmless *Conard* and *Harris* against any claim or suit, that might be brought by any person in reference to said property; and that no suit should be brought on any of said notes, while any legal claim, mortgage, &c., against said property should remain unsatisfied, unless the plaintiff should furnish sufficient security against said claims, which stipulations *Conard* and *Harris* did accept and consent to, and took and kept and continued to keep possession of said property, and to use the same; that the plaintiff has always performed, and has always been ready and willing to perform, his said agreement; that before the commencement of this suit, or of any suit on any of the notes, he furnished said defendants sufficient security, &c.; and that since said sale, he has satisfied said mortgage so far as it was a lien on said property; and this he is ready to verify.

Rejoinder: And the defendants as to said replication say *actio non*, because they say that the said mortgage, in said replication mentioned, was not paid and released before the *notes became due, and before the institution of this suit; and of this they put themselves upon the country.

Special demurrer to this rejoinder, and the demurrer sustained.

Admitting the second plea to be good, of which, however, we give no opinion, the replication to it is, in substance, sufficient. According to the plea, the plaintiff agreed to give *Conard* and *Harris*, on or before the notes, or any of them,

became due, a complete title to the property, clear of any incumbrance; but according to the replication, it was a part of the agreement that no suit should be brought on any of the notes while there was any lien on the property, unless the plaintiff should furnish sufficient security against such lien. As the plea states the agreement, the property was to be discharged from all incumbrances at or before the time any of the notes fell due, but as the replication states it, an indemnity only was to be given against the incumbrances before suit on any of the notes. The replication, therefore, represents the agreement to be a different one from that which the plea describes, and is consequently valid on general demurrer, as a substantial denial of the plea. It improperly concludes with a verification, but that is only a matter of form. 3 Will. Saund., 190, note. That part of the replication alleging payment of the mortgage, without saying when it was paid, amounts to nothing.

The rejoinder, which is to the whole replication, has no application to the material part of it, and is therefore bad.

There is a replication to the third plea, a rejoinder to the replication, and a special demurrer to the rejoinder; and the demurrer was sustained. The third plea is pleaded in bar of the whole cause of action, and attempts to answer only the first count; it is insufficient, therefore, on general demurrer.

There is a replication to the fourth plea, a rejoinder to the replication, and an issue thereon to the country.

The fifth plea was replied to, the replication specially demurred to, and the demurrer overruled. The fifth plea, like the third, professes to answer the whole cause of action, and only attempts to answer the first count; it is therefore substantially bad.

The sixth plea is to the first count, and is in substance as follows: That the note was executed in part payment for the "Wabash Courier" newspaper and printing establishment at *Terre Haute*, embracing the whole claim to the patronage, subscription list, and book of subscribers to the paper, together with the press, &c., sold by the plaintiff to the defendants for the sum of \$5.00 in hand.

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and the further sum of \$2,000, for the payment of which the note sued on and other notes were given; that, in further consideration of said notes, it was agreed by the plaintiff with the defendants that no newspaper or printing office should be established by himself, or by any person for him, within fifty miles of *Terre Haute*; that one *Thomas Dowling*, who, at the time of said sale, owned one-half of said property, has, since the sale, established, and has ever since continued to publish a newspaper called "The Wabash Express," in *Terre Haute*; that the plaintiff, at the time of establishing the paper, and since, aided and assisted the said *Thomas* in so establishing and continuing the same, and, in fraud of his said agreement, aided in diverting the patronage of the newspaper and establishment so sold as aforesaid from the same; that by his aid and procurement, and in combination with said *Thomas*, the same was diverted and withdrawn from the "Wabash Courier," and transferred to "The Wabash Express," to the great injury of the patronage and support of the "Wabash Courier;" wherefore, the consideration of said note has wholly failed.

General demurrer to the sixth plea, and the demurrer sustained.

The plaintiff's agreement relied on in the sixth plea is that no newspaper nor printing office should be established by himself, nor by any person for him, within fifty miles of *Terre Haute*; but there is no allegation that the plaintiff, or any person for him, had so established any such paper or office. The alleged conduct of the plaintiff does not show a breach of the agreement, and the plea must therefore be bad. Whether, if such breach had been shown, the plea would have been good, we have not examined.

The issues in fact and assessment of damages were submitted to the Court, and judgment rendered for the plaintiff. There is no error complained of in this part of the cause.

[*485] **Per Curiam*.—The judgment is affirmed with 2 per cent. damages and costs.

R. W. Thompson and *C. W. Barbour*, for the plaintiffs.

W. D. Griswold and *J. P. Usher*, for the defendant.

PAINE and Another v. DOE, on the Demise of GRIFFIN.

VOLUNTARY CONVEYANCE.—A voluntary conveyance of real estate can not be impeached by proof of the verbal or written declarations of the grantor, made subsequently to its execution.

SAME—SUBSEQUENT PURCHASE.—Such conveyance, if made *bona fide*, is valid against a subsequent purchaser *with notice*.(a)

SAME—EVIDENCE OF FRAUD.—That a person was deeply involved in debt when he executed a voluntary conveyance of land, is strong evidence that the conveyance was made to defraud subsequent purchasers.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an action of ejectment against *Paine* and another for a certain half lot of ground in *Madison*. Plea, not guilty. The cause was submitted to the Court.

The facts are as follows: In 1824, one *Charles Griffin* being the owner in fee of the premises in question, conveyed the same to his infant son, the lessor of the plaintiff, in consideration of natural love and affection. The conveyance was recorded a few days after its execution. The grantor, at the time he executed this conveyance, was deeply involved in debt, and was frequently sued and imprisoned for his debts. One of the objects of the conveyance was to secure the property from the claims of his creditors. In 1827, the said grantor, *Charles Griffin*, sold and conveyed the said premises, for a valuable consideration, to one *Loring*, from whom the defendants derive their title.

The defendants offered as evidence a memorandum, made a few days after the voluntary deed was recorded, on the margin of the record of that deed, as follows: "I hereby declare this deed to be null and void, as the same was made without consideration and for the purpose of securing my lot [*486] *against creditors." The plaintiff objected to this evidence, and the objection was sustained.

The Court gave judgment for the plaintiff, and overruled the defendants' motion for a new trial.

(a) *Hilen v. Bruen*, 21 Ind., 137.

Paine and Another v. Doe, on the Demise of Griffin.

One error assigned is, that the evidence rejected should have been admitted. We think the Court was right in rejecting the memorandum as evidence. The grantor who made it was interested in having the voluntary deed previously executed set aside. His verbal or written declarations, therefore, made subsequently to its execution, ought not to be received to affect the title of the voluntary grantee.

The other error assigned is, that a new trial was improperly refused.

Whether the voluntary deed was void or not as to a subsequent purchaser for valuable consideration with notice? was the question to be decided.

There are *English* cases in which it is held that a *voluntary* conveyance is in all cases void, under the statute of 27 of Eliz., in regard to a subsequent purchaser for value. The correctness of those cases has however been frequently questioned. Sir *William Grant* says: "It must, I conceive, be assumed, that the statute of the 27th of Elizabeth has now received this construction; that a voluntary settlement, however free from actual fraud, is, by the operation of that statute, deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of the prior voluntary settlement. I have great difficulty to persuade myself, that the words of the statute warranted, or that the purchase of it required, such a construction; for it is not easy to conceive how a purchaser can be defrauded by a settlement, of which he has notice before he makes his purchase. But it is essential to the security of property that the rule should be adhered to, when settled; whatever doubt there may be as to the grounds on which it originally stood." *Buckle v. Mitchell*, 18 Vesey, 100.

The Supreme Court of the *United States* has refused to recognize the decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a voluntary conveyance.

The language of Chief Justice *Marshall* is as follows:
 [*487] *"The universally received doctrine of that day"
 (time of the *American* revolution) "unquestionably

Paine and Another v. Doe, on the Demise of Griffin.

went as far as this: A subsequent sale, *without notice*, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud; which threw on those claiming under such settlement the burthen of proving that it was made *bona fide*. This principle, therefore, according to the uniform course of this Court, must be adopted in construing the statute of 27 Eliz., as it applies to this case." *Cathcart v. Robinson*, 5 Pet., 264, 280.

It has been held by this Court, that a subsequent purchaser for value, *with notice* of a prior voluntary conveyance, is not protected by the statute of 1838. *Stanley v. Brannon*, 6 Blackf., 193; *McNeely v. Rucker*, Id., 391.(1)

There is an important feature, however, in the case before us, which did not belong to the former cases in this Court; that is, the great indebtedness of the grantor when he executed the voluntary conveyance. We think that indebtedness is very strong evidence that the voluntary conveyance was made to defraud not only creditors but subsequent purchasers also. It was said by Lord *Mansfield*, in a suit like the present, between a voluntary grantee and a subsequent purchaser, that "one great circumstance, which should always be attended to in these transactions, is whether the person was indebted at the time he made the settlement; *if he was, it is a strong badge of fraud.*" *Doe v. Routledge*, Cowp., 705.

It is our opinion, therefore, that the facts of the case are decidedly in favour of the defendants; and that they ought to have a new trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiffs.

C. Cushing, for the defendant.

1) *Vide* R. S., 1843, pp. 591, 592.

Doe, on the Demise of Franklin and Others, v. Harter and Another.

[*488] *DOE, on the Demise of FRANKLIN and Others, v.
HARTER and Another.

WILL—WORD HEIRS.—The word heirs is not necessary in a will of real estate, as it is in a deed, to convey the fee; but still, to give a fee something more than the mere devise of the land is necessary.

CONSTRUCTION OF WILL.—In a devise of land to A, the devisee was required, in consideration of the gift, to support his mother and the testator during their lives, and to pay the funeral expenses "*out of the proceeds of the farm on said land.*" Held, that the charge did not enlarge the devise to a fee by implication.

SAME.—The charge can not produce that effect unless the devisee may, by paying it, possibly sustain a loss unless he takes a fee.

SAME.—The introductory clause in a will was, "As to such *wordly estate* as it has pleased God to intrust me with, I dispose of *the same* in the following manner," &c. The will also contained this clause: "And to effectuate this my intention, I bequeath, &c.; and I also will and bequeath that P. F., my son, shall have the eighty acres of land whereon I now live," &c. Held, that P. F. took an estate in fee.(a)

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of ejectment for a certain tract of land in *Tippecanoe* county. Plea, not guilty. The cause was submitted to the Court, and judgment rendered for the defendants.

The following are the facts: *Joseph Franklin* was the owner in fee of the land in question at the time of making his will hereafter mentioned, and at his death in 1833. His only heirs at law are the lessors of the plaintiff, together with one *Preston Franklin*. The said *Preston*, his son *Jesse*, and the widow of the aforesaid *Joseph Franklin* are all dead; *Jesse* having died first, the widow next after him, and *Preston* after the widow. *Preston* took care of his father and mother, as required by said will, and, in 1835, sold and conveyed the said land to one of the defendants.

The will of *Joseph Franklin* reads as follows: "I, *Joseph Franklin*, of *Tippecanoe* county, in the State of *Indiana*, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made. As to such worldly estate as it has pleased

(a) *Patterson v. Doe*, 7 Ind., 282; 3 Id., 50.

Doe, on the Demise of Franklin and Others, v. Harter and Another.

God to intrust me with, I dispose of the same in the following manner, to wit: I direct, first, that all my just debts and funeral expenses be paid as soon after my decease as [*489] possible, *out of the first moneys that shall come to the hands of my executors from any portion of my personal estate. Inasmuch as my oldest children have all married and left me, and I gave them what I had to spare them at the time they left me; and to effectuate this my intention, I bequeath to my wife, *Elizabeth Franklin*, a comfortable support during life, or so long as she remains my widow, off the plantation, with the household goods and farming utensils to remain on the place; and all the stock of horses, cattle, hogs and sheep, except such as shall hereafter be mentioned; and I also will and bequeath that *Preston Franklin*, my son, shall have the eighty acres of land whereon I now live, at the death of his mother; for which he is to take care of us as long as we both shall live, and pay the funeral expenses, out of the proceeds of the farm on said land; and if it should so happen that *Preston* should die before his mother, that the land shall go to his son, *Jesse Franklin*. I also will my son, *Jacob Franklin*, one two year old heifer; and to my son *James Franklin*, and *Ollavit Sheagley* and *Nancy Lewis* my daughters, I will and bequeath \$1.00 to each of them; and hereby make my son *James Franklin*, and *Samuel Black*, executors of this my last will and testament. In witness whereof, *Joseph Franklin*, testator, has hereunto set his hand and seal, this 29th of *March*, 1833."

The only question presented by this case is, whether the will gives an estate in fee-simple, or only for life, to *Preston Franklin*, in the land devised to him?

The defendants, who claim under *Preston Franklin*, contend that the devise to him, though it does not contain the word heirs, is of a fee-simple estate. The law on the subject is, that the word heirs is not necessary in a will, as it is in a deed, to convey the fee; but still, to give a fee, something more than a mere devise of the land is necessary.

In this case, there is a clause requiring the devisee, in consideration of the gift, to support his mother and the testator

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during their lives, and to pay the funeral expenses, *out of the proceeds of the farm on the land devised*. But this is not such a charge as will enlarge the devise to a fee by implication. The charge can not produce that effect unless the devisee may, by paying it, possibly sustain a loss unless he

[*490] *takes a fee. Collier's case, 6 Coke, 16. Here, as the charge was to be paid *out of the proceeds of the farm*, there could be no loss to the devisee. 2 Prest. on Estates, 237.(1)

This will has an introductory clause as follows: "As to such *worldly estate* as it has pleased God to intrust me with, I dispose of *the same* in the following manner," &c. There is also this clause: "And to effectuate this my intention, I bequeath," &c. The introductory clause clearly shows, by the use of the word "estate," the testator's intention to devise the fee. It is well settled that by the word "estate" in a will, when descriptive of the testator's interest in the land, and he has a fee in it, a fee passes. *Doe d. Lean v. Lean*, 1 Adol. & Ellis, 229. But it is admitted that the introductory clause would not, of itself, be sufficient to convey the fee; there must be something to show that the intention was carried out. The intention is carried out in the present will by what follows, to wit, "And to effectuate this my intention, I bequeath, &c.; and I also will and bequeath that *Preston Franklin*, my son, shall have the eighty acres of land whereon I now live," &c. We think the introductory clause and the words of the devise are here connected together, and that the devise which, taken by itself, is only for life, is, when considered with the introductory clause with which it is united, a devise in fee.

Per Curiam.—The judgment is affirmed with costs.

J. Pettit and *S. A. Huff*, for the plaintiff.

G. S. Orth, for the defendants.

(1)The law here now is, that every devise of lands shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall manifestly appear by the will that the devisor intended to convey a less estate. R. S., 1843, p. 485.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1845, IN THE THIRTIETH YEAR OF THE STATE.

MILLER and Another v. WHITE and Another.

PAROL EVIDENCE TO VARY NOTE.—Parol evidence is not admissible to show that a promissory note payable on its face on a certain day, was to be paid at that time only on a contingency mentioned in a written contract between the parties made before the execution of the note.(a)

ERROR to the *Henry* Circuit Court.

DEWEY, J.—Assumpsit before a justice of the peace, taken by appeal to the Circuit Court. The cause of action was a promissory note made by the defendants, and dated 20th *April*, 1837, by which they promised to pay the plaintiffs a certain sum, twelve months after date, for hats purchased of them. Plea, general issue, by virtue of the statute. The cause was tried by the Court. Judgment for the defendants.

NOTE.—Judge *Sullivan* was absent until the 10th day of the term, in consequence of indisposition.

(a)*Swank v. Nichols*, 20 Id., 198.

Miller and Another v. White and Another.

On the trial, the plaintiffs read the note in evidence and rested their cause. The defendants gave in evidence a bill of hats purchased by them of the plaintiffs on the 27th *January*, 1836, which was balanced by a bill of goods sold to [*492] the *plaintiffs, and by a note made by the defendants to the plaintiffs, payable one year after date. To this bill of hats was appended the following memorandum signed by the plaintiffs: "It is understood between us, that all hats of our manufacturing that are not sold at the expiration of the year, are not to be paid for until sold." The defendants also proved that the note credited on the bill of hats had been paid by them; that, subsequently, several other lots of hats had been left with them by the plaintiffs to be sold on the same terms, for which notes had been given in the same way, and had been paid; that when the hats for which the note in question was given, were purchased by the defendants, they paid a part of the price in merchandise, and gave the note for the balance; that when these hats were delivered, the defendants asked the plaintiffs, if they were to be delivered on the contract theretofore subsisting between the parties, to which the plaintiffs answered in the affirmative; and that a part of the last lot of hats remained unsold by the defendants, which, together with the unsold portion of former lot of hats, amounted in value to more than the note on which the action is founded. This evidence was all objected to by the plaintiffs, but the objection was overruled.

We can not sustain the judgment of the Circuit Court. We think the evidence given by the defendants was inadmissible. Its object was to show that the note in question was not payable in one year according to its purport; but that the obligation to pay it at that time depended upon a contingency expressed in another written contract, made between the parties more than a year before the date of the note. Had the note itself contained a reference to that contract, both might have been viewed as one contract, and been construed together. But to suffer a connection between them to be established by parol evidence, would be a violation of the rule, that such evidence

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is not admissible to change or explain a written contract. This rule is familiar, and we have frequently acted upon it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiffs.

R. M. Cooper, for the defendants.

[*493] *HARRIS v. COBB and Others, in Error.

DECREES in chancery for money were repleviable under the act of 1840. Stat., 1840, p. 49. They may also be replevied under the act of 1843. R. S., 1843, p. 846.

THE STATE v. WILLIAMS.

PRACTICE—DEFENDANTS NOT FOUND.—A writ, issued in *A* county, against three persons, was returned “not found” as to two of them, and the return suggested of record. The other defendant pleaded, in abatement, that all the defendants were, when the writ issued, and still were, resident in *B* county. *Held*, that the plea was bad.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—This was an action of debt commenced by the State against *William Williams, Junior, William Williams*, and *Jonathan Williams*, in the Marion Circuit Court. The suit is founded on the joint and several bond of the defendants. The declaration was filed on the 18th of *October*, 1844; and, at the next term of the Court, the plaintiff suggested of record that *William Williams* and *William Williams, Junior*, had not been found, as appeared by the return of the writ.

The defendant, *Jonathan Williams*, then pleaded in abatement that neither he, nor either of the other defendants, resided in *Marion* county when the writ issued, nor had any of them ever

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resided in said county; and that they were, when the writ issued, and still were, residents of *Morgan* county, &c.

Demurrer to this plea, and judgment for the defendant.

The judgment is wrong. Upon the return of the writ executed on one of the defendants, and "not found" as to the others, the plaintiff having entered a suggestion of the return of "not found," could, by statute, proceed against the defendant alone on whom the writ was served. R. S., 1843, p. 675. And it was of no consequence where any of the defendants resided. The statute relied on by the defendant has [*494] no application to this case. It authorizes a plaintiff to proceed against a defendant not resident in the county where suit is brought, provided process be executed on a defendant in the suit resident in that county. R. S., 1843, p. 674. But in the case before us, the plaintiff did not attempt to proceed against *William Williams* and *William Williams*, junior, resident in *Morgan* county. On the contrary, he showed by the suggestion he entered that it was not his intention to do so. The demurrer should have been sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. and H. Brown, for the plaintiff.

W. Quarles, J. H. Bradley, and W. W. Wick, for the defendant.

THE STATE v. HOPKINS and Others.

CRIMINAL LAW—JOINT DEFENDANTS.—Indictment against *A, B, and C*, for failing to discharge their duty as county commissioners, &c. The defendants plead guilty; and a judgment was rendered against them, that they make their fine in a certain sum to the State. *Held*, that this judgment being joint, was erroneous.

SAME—INDICTMENT.—In the caption of an indictment a certain year was named; but in the indictment itself, commencing with the words, "The grand jurors impaneled," &c., there was no notice of any year except by the words, "in the year of our Lord aforesaid," &c. *Held*, that the indictment, therefore, (the caption being no part of it), was bad.

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ERROR to the *Vanderburgh* Circuit Court.

BLACKFORD, J.—This was an indictment against *Edward Hopkins*, *Benoni Stinson*, and *Simpson Ritchey*, for neglecting and refusing, as county commissioners of *Vanderburgh* county, to fix the *per centum* on the taxable property in said county, necessary to be levied for road purposes. The defendants pleaded guilty. Judgment, that the defendants make their fine to the State in the sum of one cent, and that they pay costs, &c.

This judgment is erroneous, because it is joint. If the defendants were liable on this indictment, they could only be so in their individual capacities; and there should have been a judgment against each of them. The judgment must, therefore, be reversed.

[*495] *In looking into the record, as the statute requires, for the first error, we find the indictment to be bad.

The record of the cause, after the *placita*, proceeds as follows: Be it remembered that heretofore, to wit, at the *September* term of said Court, begun and held as aforesaid, in the year 1841, the grand jurors impaneled and sworn to inquire for the State of *Indiana* and the body of the county of *Vanderburgh*, upon their oath, present, that *Edward Hopkins*, *Benoni Stinson*, and *Simpson Ritchey*, all of said county, on the first day of *June*, in the year of our Lord aforesaid, and for a long time, &c., were county commissioners, &c.

The defendants are here alleged to be county commissioners “in the year of our Lord aforesaid;” and in every other part of the indictment where the year should be stated, it is only described as “the said year,” or “the year aforesaid.” The indictment, as the record shows, commences as follows: The grand jurors impaneled and sworn, &c., upon their oath present, &c. There is no year set out in it; and the words “in the year of our Lord aforesaid,” “the said year,” &c., amount to nothing. In the caption of the indictment, beginning with the words “Be it remembered,” the year 1841 is named. But the caption is no part of the indictment. It is the mere statement of the clerk, made after the suit is determined, in making up the record.

Thompson v. Harbison.

Per Curiam.—The judgment is reversed. Cause remanded &c.

A. A. Hammond and J. Lockhart, for the State.

THOMPSON v. HARBISON.

JUSTICE'S JURISDICTION.—The act of 1843, giving justices of the peace jurisdiction in actions by and against executors and administrators, applies to causes of action which existed at the time of its passage, as well as to those that might afterwards accrue.

SAME.—*Sci. fa.* issued by a justice of the peace for execution against replevin-bail. The writ recited a judgment recovered by the plaintiff against *A* before the justice in 1840; the defendant's entering himself as bail; the death of *A* in 1840; the granting of administration of his estate to *B*; the issuing of a *sci. fa.* by the justice against *B* as administrator, and the revival of the judgment against him in 1844; the issuing of a *fi. fa.* against *B*, and the return thereof of *nulla bona*, &c. Held, that the writ was sufficient.

[*496] *ERROR to the *Dubois* Circuit Court.

DEWEY, J.—*Scire facias* against bail for the stay of execution. The writ recites a judgment recovered by the plaintiff against one *Powers* before a justice of the peace, in 1840; the entering into bail for the stay of execution by the defendant; the death of *Powers* in 1840; and the granting of letters of administration of his estate to one *Read*; the issuing of a *scire facias* by the justice against *Read*, as administrator, and the revival of the judgment against him in 1844; the issuing of a *fi. fa.* against him, and the return thereof of *nulla bona*, &c. The defendant demurred generally to the *scire facias*, and the demurrer was sustained. Final judgment for the defendant.

The statute under which the judgment against *Powers* was rendered, and the bail for the stay of execution was entered by the defendant, required that to render the bail liable, a *fi. fa.* against the goods and chattels of the judgment-debtor should issue, and be returned "no goods found." R. S., 1838, p. 374. At the time of the death of *Powers* in 1840, no such

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return had been made, nor was any made until 1844, after the revival of the judgment against his administrator. The revival of a justice's judgment on account of the death of a judgment-debtor was not provided for by the statute of 1838, but is authorized by a subsequent act, which was in force when the judgment recited in the *scire facias* was revived, and which extends the jurisdiction of justices of the peace to actions by and against executors and administrators. R. S., 1843, p. 863.

It is admitted by the defendant in error that the death of Powers, the judgment-debtor, before a return of "no goods" to an execution against his goods and chattels, did not exonerate his replevin-bail; but he contends that the revival of the judgment in 1844, and the return of *nulla bona* to the execution against his administrator, are not sufficient to fix his bail for the stay of execution. This objection is founded upon the supposition that the law, prior to 1843, did not authorize a justice of the peace to issue a *scire facias* to revive a judgment against an administrator, and that the statute of 1843 does not embrace causes of action which existed at the time of

its passage. If this view of the law were correct, it [*497] would *follow that, in cases like the present, the judgment-creditor would be obliged to resort to chancery to enforce a remedy against the replevin-bail. We can not think that such was the design of the Legislature. We, therefore, conclude that it was designed by the statute of 1843 to include causes of action which existed at the time of its passage, as well as those which might afterwards accrue. This construction removes all objection to the sufficiency of the *scire facias* under consideration. The writ contains the necessary averments to render the defendant liable as replevin-bail.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pitcher, for the plaintiff.

E. S. Terry, for the defendant.

POWERS v. DAVENPORT.

COMMON CARRIER.—A common carrier, or a private person who undertakes for hire to carry and deliver goods safely, is bound to pursue the usual and ordinary route. If he unnecessarily deviate from that route, he will be liable for any injury to the goods which may be thereby occasioned.

ERROR to the *Montgomery* Circuit Court.

DEWEY, J.—Assumpsit by *Powers* against *Davenport* before a justice of the peace, and appealed to the Circuit Court. The action, so far as its cause need be stated, is founded on the following instrument signed by the defendant: *Cincinnati*, 17th June, 1839. Received of *J. P. Powers* in good order and condition four packages of merchandise, (describing them), which I promise to deliver in like good order and condition to *J. W. Powers, Crawfordsville, Ia.*, at the rate of \$2.00 per hundred pounds. Plea, the general issue; verdict for the defendant; motion for a new trial overruled; and judgment on the verdict.

On the trial, the plaintiff gave in evidence the above stated written undertaking of the defendant. He also proved that the defendant carried the goods in his wagon; that, before he reached *Crawfordsville*, he left the direct and principal road from *Cincinnati* to that place, taking a more circuitous [*498] *route, which led past his own dwelling, and thereby increased the distance about one mile; that, after the defendant so deviated from the usual route, he drove on to a bridge which gave way, thereby upsetting the wagon and throwing the goods into the water, whereby they were injured to the amount of more than \$60.00. It also appeared in evidence that the bridge was considered safe before the accident; that the road taken by the defendant was preferred by some to the more direct and more generally traveled way to *Crawfordsville*; that "movers" had been known sometimes to take it, but wagoners in carrying from *Cincinnati* to *Crawfordsville* never used it; that the defendant was a farmer, making farming his principal business, but frequently carrying for hire.

The question, whether the evidence showed the defendant

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to be a common carrier, was made in the Court below. But as the defendant is not sued on the general liability arising from that capacity, but on a special undertaking, we consider the question immaterial, and shall no further notice it.

The real inquiry is, whether the evidence justifies the verdict. A common carrier is responsible for all losses and injuries of goods committed to his care, except those caused by the acts of God (including inevitable accidents) and by the public enemy; and a private person, by undertaking for hire to carry and deliver goods safely, subjects himself to the same liability. 2 Stark. Ev., 283; *Coggs v. Bernard*, 2 Ld. Raym., 909; *Robinson v. Dunmore*, 2 B. & P., 416. The promise of the defendant in this cause was that he would deliver goods, which he received at *Cincinnati* in good condition, at *Crawfordsville*, in like condition. He failed to do so; the goods were damaged in the carriage. He is, therefore, responsible to the owner of them, unless he stands excused on the score of inevitable accident. So far from this being the case, the accident happened in consequence of his own improper conduct. It would have been avoided, had he continued on the most direct and customary route from *Cincinnati* to *Crawfordsville*. The personal motive—a desire to go to his own house, which probably induced him to deviate, was not a legal excuse for his doing so.

His liability can not be distinguished from that of
 [*499] any other person who *had done the same thing without the same motive. It has been held that a carrier by water, whether he navigate a general ship, or one hired especially for the occasion, is bound to keep in the usual course of navigation; and that if he deviate unnecessarily, and a loss happen in consequence thereof, he is liable. *Davis v. Garrett*, 6 Bingh., 716. This principle is equally applicable to a carrier by land, whether he act in a public capacity, or under a special undertaking. The defendant having undertaken for hire to transport goods safely from *Cincinnati* to *Crawfordsville*, was bound to pursue the usual and customary route; and he is liable for all loss sustained in consequence of his unnecessary deviation from it.

Waltz and Another v. Robertson.

The facts in this case are plain and simple. There was no clashing of testimony. There was no conflicting evidence for the jury to weigh. The question to be determined is one purely of legal liability; and we think the jury came to a conclusion which the law arising from the facts did not warrant; and that the motion for a new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. S. Lane and *S. C. Willson*, for the plaintiff.

R. C. Gregory, for the defendant.

WALTZ and Another v. ROBERTSON.

PRACTICE.—Assumpsit for lumber sold and delivered. Pleas, non assumpsit and set-off. On the trial, the defendant introduced in evidence a bill of lumber made out by a carpenter who had built him a house. The Court permitted the jury to take this bill to their room, after charging them that they could not receive it as evidence of itself of the amount of lumber contained in the house, but that if a witness had testified to it as being the correct amount of lumber the house contained, they might refer to it as a memorandum of what his evidence was on that subject. *Held*, that, under the statute, there was no error in permitting the jury, with the instructions given, to take the bill.

ERROR to the *Henry* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit for the price of boards, scantling, plank, &c., sold and [*500] delivered, *brought by the plaintiffs in error. Pleas, non assumpsit and set-off. Verdict and judgment for the defendant.

On the trial, the defendant, for the purpose of showing the quantity of lumber he had received from the plaintiffs, introduced in evidence a bill of lumber made out by a carpenter who had built him a house. The Court permitted the jury to take this bill to their room, after charging them that they

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could not receive it as evidence of itself of the amount of lumber contained in the house; but that if a witness had testified to it as being the correct amount of lumber the house contained, they might refer to it as a memorandum of what his evidence was on that subject. The record does not set out the evidence given in the cause.

The Court committed no error in permitting the jury to take the bill to their room. The permitting of the jury to take such papers with them, is expressly authorized by statute. R. S., 1843, p. 734. And we see no objection to the charge to the jury. It gave them correct information as to the manner in which they should view the bill.

Per Curiam.—The judgment is affirmed with costs.

C. H. Test, for the plaintiffs.

M. S. Ward and *S. W. Parker*, for the defendant.

PATE v. SWANN and Others.

EXEMPTION FROM EXECUTION.—Under the act of 1843, an execution-defendant may claim as exempt from execution, at any time before the sale, any personal property levied on, not exceeding in value \$125.

ERROR to the *Union Circuit Court*.

BLACKFORD, J.—This was an action of trespass against the defendants in error for forcibly taking away two of the plaintiff's horses, &c., in *November, 1844*. One of the defendants, *Cason*, pleaded in bar as follows: That the other defendants, on the 20th of *September, 1844*, recovered a judgment against the present plaintiff, *Pate*, for \$73; that a *fieri facias* was issued on the judgment, and was delivered to the defendant, *Cason*, as sheriff to be executed; that this defendant levied the execution upon the property mentioned in the

[*501] *declaration, and sold the same, &c. This plea was replied to as follows: That on, &c., after the levy of the execution and before the sale, the plaintiff being a householder, claimed of the sheriff the property levied on as exempt

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from execution; that the value of said property, including the articles owned by the plaintiff and designated by statute as exempt from execution, did not exceed \$125.

General demurrer to the replication, and judgment for the defendants.

There is an irregularity in this case. Only one of the defendants pleaded, and on a demurrer to a replication to his plea, the Court gave judgment for all the defendants.

We think the Court erred in sustaining the demurrer to the replication. The statute governing this case reserves to an execution-defendant the right of selecting, as exempt from execution, personal property not exceeding in value \$125. It repeals all laws coming within its purview, and says that nothing in the revised laws of that session should be construed to contravene or repeal any of its provisions. R. S., 1843, pp. 1046, 7, ss. 9, 14. The replication states that, previously to the sale, the plaintiff claimed of the sheriff, as exempt from execution, the horses levied on, and avers that their value did not exceed \$125. That is, under the statute, a good answer to the plea. That part of the replication which speaks of articles designated by statute as exempt from execution, may be considered as surplusage. That the claim was made in time is settled, under a statute similar to that above cited so far as that matter is concerned, by the case of *Stephens et al. v. Lawson*, Nov. term, 1844.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid and *S. E. Perkins*, for the plaintiff.

J. Perry and *J. Yaryan*, for the defendants.

JOHNSON v. McLANE.

CONTRACT—TRADE.—If two persons exchange horses, with the privilege to one of the parties to return, within a given time, the horse received by him in exchange, and such party fail, within the time, to return the horse so received, the contract becomes absolute.

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[*502] *SAME—WARRANTY.—And a breach of warranty as to one of the horses will not, of itself, affect the validity of the exchange.

RESCISSION OF CONTRACT.—The vendor of goods, though defrauded in the sale by the vendee, can not treat the sale as a nullity, whilst he willingly holds in his hands a valuable consideration which he received for the goods.(a)

SAME.—A party having a right to rescind a contract, must exercise the right within a reasonable time.

LIEN OF EXECUTION.—A *fi. fa.* binds the goods of the debtor from the time it is delivered to the sheriff, though the latter fail to indorse on it the time of such delivery.

SAME.—After *A* and *B* had exchanged horses, a *fi. fa.* against the former was delivered to the sheriff; and after such delivery, *A* and *B* re-exchanged the horses. The sheriff afterwards levied the execution on both horses as *A*'s property. Held, that such levy was not a relinquishment of the lien of the execution on the horse originally owned by *B*.

ERROR to the Decatur Circuit Court.

DEWEY, J.—Trial of the right of property taken on execution, on the claim of *Johnson* against *McLane*, the execution-creditor. Cause appealed to the Circuit Court. Verdict and judgment for the defendant.

The facts are as follows: *McLane* recovered a judgment against one *Swope* in the Decatur Circuit Court, and, on the 13th of June, 1842, caused an execution to be issued thereon, which, on the same day, was delivered to the sheriff, who made no indorsement of the time of delivery upon it; on the 29th of August of the same year, the sheriff levied the execution on a mare, a bay horse, and a sorrel horse, as the property of *Swope*—the mare being found in the possession of *Johnson*. About the first of June aforesaid, the mare was owned by *Johnson*, and the bay horse by *Swope*; *Johnson* and *Swope*, then, made an exchange of the mare for the bay horse, and delivered possession of the animals accordingly. It was stipulated in the contract, that *Johnson* should have the privilege of returning the horse within three or four days, if, on trial, it was found he would not work well. A defect in one of the eyes of the horse was pointed out, and *Swope* declared that he was in other respects sound. There was evidence tending to show that the

(a) *Matlock v. Todd* 25 Ind., 128; 24 Id., 332; 22 Id., 51.

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horse was a ridgling; that *Swope* knew the fact and did not disclose it to *Johnson*. After the expiration of the time limited for the return of the horse, *Johnson* declared that he worked well, and that it was his intention to keep him. There was other evidence tending to show that the horse worked [*503] well, but that he was *troublesome when harnessed with a mare, was vicious to other horses, and had to be kept by himself. About two months after the contract, and before the levy of the execution, *Johnson* demanded of *Swope* that he should take back the horse and rescind the contract, alleging as the cause of the demand the before-stated situation of the horse; at this time the horse was worked to a low condition of flesh. The parties made a new contract, by which *Johnson* received back the mare and *Swope* the horse, and he received also with him fifteen hundred pounds of hay. Subsequently to this transaction, but before the levy, *Swope* exchanged this horse for a sorrel horse, with a third person. The sheriff seized all three of the animals, as before stated, on the execution, as the property of *Swope*; and *Johnson* filed his claim for the mare, which is the property in dispute. *Johnson* and *Swope* were residents of the same village.

The Court charged the jury: 1, That by the failure of *Johnson* to return the bay horse within the period stipulated by the contract, the mare became the absolute property of *Swope*, was bound by the lien arising from the delivery of the execution to the sheriff, though the time of delivery was not indorsed on the writ, and was rightfully held by the levy. 2, That if, in the first contract of exchange, *Swope* made a false warranty of the horse, or misrepresented his qualities, neither of those circumstances would affect the right of the execution-creditor to hold the mare on the execution. And the Court refused to instruct the jury: 1, That if *Swope*, at the time of the first contract, made false and fraudulent representations in regard to the soundness and qualities of the horse, no property in the mare vested in him; and that, if *Johnson* got her back before the levy, she was not subject to the execution. 2, That the seizure of the bay horse on the execution was a relinquishment of the lien on the mare.

Three questions are presented by the facts of this cause, the solution of which will test the correctness of the decisions of the Court in reference to the instructions: Was the mare the property of *Swope*, the execution-debtor, at the time the writ was delivered to the sheriff? Was the delivery of the writ a lien upon that property? And if so, did the seizure of the bay horse on the execution discharge the lien?

[*504] *As to the first question: If the contract of exchange between *Johnson* and *Swope* be viewed independently of a warranty which was broken, and of any question of fraud, there can be no doubt that the ownership of the mare was vested unconditionally in *Swope*, and of the horse in *Johnson*, by the failure of the latter to return the horse within the stipulated period. By such failure the contract became absolute, and effected a complete change of property in the two animals. The right of *Johnson*, under the contract, to return the horse ceased on the third or fourth day of *June*. *Swope*, of course, was the owner of the mare on the 13th of that month, the day on which the execution was delivered to the sheriff. But even if there was a *bona fide* but broken warranty in respect to the horse by *Swope*, that alone could not change the result. It did not annul the contract of exchange, and divest *Swope* of the ownership of the mare; she still remained his, as the horse belonged to *Johnson*. *Weston v. Downes*, 1 Dougl., 23; *Power v. Wells*, Cowp., 818; *Payne v. Whale*, 7 East, 274; *Emanuel v. Dane*, 3 Campb., 299; *Street v. Blay*, 2 B. & Adol., 456; *Gompertz v. Denton*, 1 C. & M., 207. If the contract be viewed as fraudulent on the part of *Swope*, in consequence of willfully false representations made by him, a question of more difficulty presents itself. There are many cases, certainly, in which it has been held that a vendee acquired no property in goods obtained under pretense of a purchase brought about by his own fraud. But we know of no decision in which the vendor has been viewed as not having parted with the ownership of goods while he willingly held in his own hands a valuable consideration received for them. On the contrary, we conceive the law to be that such a vendor is not at liberty to treat the sale as a nullity

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on account of the fraud of the vendee. *Burton v. Stewart*, 3 Wend., 236. The exchange of horses between *Johnson* and *Swope* was made about the 1st of *June*. If *Johnson* had the right to return the horse and rescind the contract, in consequence of the fraud of *Swope*, (with regard to which we give no opinion), he was bound to do it within a reasonable time. Chitt. on Cont., 573. But he kept the horse, and worked him nearly two months, without complaint, and without any [*505] attempt to return him, though he had daily *opportunities of doing so had he desired it. It is not shown in excuse of this delay, that he did not sooner discover the objection to the horse; and from the nature of the objection, it is probable he must have known it in a very short time. We think, therefore, if the right to rescind the contract ever existed it was forfeited by delay. The mare was the property of *Swope* on the 13th of *June*, when the sheriff received the execution on which she was taken. It is true that, prior to the levy *Johnson* had become the owner of her by his second contract with *Swope*; but he took her subject to the lien of the execution if a lien existed. *McCall v. Trevor et al.*, 4 Blackf., 496.

Did the lien exist? It is contended that it did not, because the sheriff did not indorse the time at which he received the execution upon it; that being, as is alleged, the only legal evidence of the date of the delivery of the writ to the officer. The statute which governs this point provides, that no writ of execution shall bind the goods of the execution-debtor, until the writ shall be delivered to the officer; whose duty it shall be to indorse upon it the day of the month, and the year, on which he received it. R. S., 1838, p. 318. This provision is contained in the statute of frauds and perjuries, which renders the objection to the lien on account of the absence of the indorsement on the writ plausible; but we do not think it can prevail. The lien was created for the benefit of the execution-creditor; and we can not bring ourselves to believe, that it was the design of the Legislature to deprive him of it without any fault of his own, and by the mere neglect of a ministerial officer over whose conduct he has no control. We conceive the object

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of directing the indorsement to be made was to facilitate proof, and to prevent confusion among different executions. It is, by the terms of the statute, the delivery of the execution, and not the memorandum of the time of delivery, which creates the lien. The creditor can choose his own time for placing the execution in the hands of the officer, but he can not make the indorsement. We do not, therefore, believe that the latter is essential to the validity of the lien.

As to the third question,—whether the seizure of the horse upon the execution waived the lien on the property [*506] in dispute,—it appears to us there is not the slightest room to doubt. It was no waiver. The horse was or was not subject to the execution. If he was subject to it, surely taking him did not relinquish the lien upon other property equally liable; and if he was not subject to it, the owner has his remedy against the officer. That is a question which does not concern the present plaintiff.

Per Curiam.—The judgment is affirmed with costs.

G. H. Dunn, for the plaintiff.

C. H. Test, for the defendant.

HENRY v. HAMILTON.

PERJURY—WANT OF JURISDICTION.—If a justice of the peace issue a State warrant on an insufficient affidavit, and the party accused, on being arrested, proceed to trial before the justice without objection, the insufficiency of the affidavit will not render the proceedings *coram non judice*. And to charge a witness with swearing false on such trial is actionable.

JURISDICTION OF JUSTICE.—A justice of the peace is authorized to try and sentence a person accused of disturbing a lawful assembly.

PERJURY—CORRECTION OF EVIDENCE.—If a witness on his examination make a false statement, but afterwards correct it, so that his testimony is ultimately true, he is not guilty of perjury; and to charge him, without qualification, with swearing false in reference to that statement, is actionable.

ERROR to the *Fayette* Circuit Court.

DEWEY, J.—This was an action of slander by *Hamilton*
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against *Henry*. The declaration alleges that, on, &c., a certain action, wherein the State was plaintiff, and the defendant and others were defendants, was tried before a certain justice of the peace; that, on the trial, the plaintiff was produced and sworn as a witness on behalf of the State, on a point material to the issue, &c.; that the defendant, in a conversation of and concerning that trial, &c., charged the plaintiff with having sworn falsely. The words alleged to have been spoken by the defendant are laid in various forms, amounting, in connection with the previous averments, to a charge of perjury against the plaintiff. The defendant pleaded three pleas: 1, The general issue; 2, The statute of limitations; and, 3, A [*507] justification alleging that the plaintiff, in *the action mentioned in the declaration (which is averred to have been a prosecution for disturbing a lawful assembly), falsely, corruptly, and willfully, swore that the defendant threw one *Roysdon* off a bench, and knocked a candle from the hand of one *Remington*; whereas, in fact, the defendant did not throw *Roysdon* off the bench, or knock the candle from the hand of *Remington*, &c. Replication to this plea, *de injuria*, &c. Verdict and judgment for the plaintiff.

The plaintiff offered in evidence a transcript of the record of the trial before the justice of the peace alleged in the declaration, by which it appeared that one *Doddridge* made the following affidavit before the justice: "That on the night of, &c., at, &c., *John Henry* and others (naming them), did interrupt and disturb by contention, and various other ways, a lawful assembly of people, convened at, &c., for a lawful purpose," &c. It also appeared by the transcript, that the justice issued a warrant, on the affidavit, against the persons therein accused; that the accused were arrested, put themselves on final trial before the justice, and were by him tried, convicted, and fined, some in \$1.00, and others in \$2.00. The defendant objected to the admission of the transcript, but the objection was overruled.

The Court, on the motion of the plaintiff, instructed the jury, that, to support the plea of justification, it must appear

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not only that the plaintiff had sworn falsely on the trial alluded to, but that he had so sworn knowingly and corruptly in a material matter; and that if the plaintiff, in giving his evidence, "committed a mistake, or stated a falsehood, but upon reflection acknowledged he was wrong and corrected his evidence, that fact rebutted the willful and corrupt intent necessary to constitute perjury." And, at the request of the defendant, the Court instructed the jury, "that if they believed the defendant charged the plaintiff with swearing falsely, only in such part of his testimony as he himself afterwards corrected and admitted not to be true, such charge was not slanderous;" to which the Court added, against the consent of the defendant, "if the defendant, at the time he made the charge, stated that the plaintiff had corrected his evidence during the trial; otherwise the charge was slanderous."

[*508] *The plaintiff in error contends, that the Court erred in admitting in evidence the transcript of the record of the trial before the justice of the peace, on the ground that the transcript shows, as he alleges, that the justice had no jurisdiction of the cause which he tried, and, consequently, that perjury could not be committed in giving evidence on that trial. In support of this position, it is urged in the first place, that the affidavit does not charge an offense cognizable by the justice, because it does not show for what purpose the assembly of people, therein mentioned, assembled. If it be admitted that the affidavit is too vague to require, or even to authorize, the justice to act upon it—a question which we do not decide—it does not follow, that after he did act upon it, and after the accused persons appeared and answered to the charge without objection, the proceedings were *coram non judice* and void. The affidavit contains a charge, in general terms, that the accused persons disturbed an assembly of people convened for a lawful purpose. This is an offense known to our law; and if those persons who were so charged chose to submit themselves to a trial, without objection to the validity of the complaint, the justice could rightfully hear evidence and examine the matter. The witnesses sworn by him were amenable to the

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law if they swore falsely; and it is proper that they should be protected from a charge of perjury if they testified truly.

But it is further urged, that though the justice might have the right to make a preliminary examination of the matter, with a view to the trial of the accused in a higher Court, he had no right to put them on final trial and pass sentence upon them; and that therefore the plaintiff, who is alleged in the declaration to have given evidence on the *trial*, could not be guilty of perjury. This objection is founded on a mistake of the law, as to the extent of the jurisdiction of the justice of the peace. Justices of the peace have final jurisdiction of assaults and batteries, affrays, and other breaches of the peace; and may punish persons guilty of them by fine to the amount of twenty dollars; the defendant having the right to be tried by the justice alone, or to demand a jury. R. S., 1838, p. 361; R. S., 1843, p. 1003. The punishment for disturbing lawful assemblies is a fine of not less than one, nor [*509] *more than \$10.00. R. S., 1838, p. 218; R. S., 1843, p. 983. The justice of the peace, therefore, acted within his jurisdiction in the matter under consideration.

It is contended that the Circuit Court erred in charging the jury that if the plaintiff, when giving testimony, committed a mistake, or stated a falsehood, which, on reflection, he admitted to be wrong, and corrected his evidence, the fact of admitting his error and correcting it rebutted the idea of corrupt intention in making the mistake or untrue statement. Had it been material to inquire into the intention with which the false statement thus corrected was made, it would, perhaps, have been going too far for the Court to instruct the jury what would or would not have rebutted such intention; because that would have involved a question of the weight of evidence, of which the jury would have been the proper judges. But the charge in question could have had no tendency to influence the jury improperly and bring them to a wrong conclusion as to the merits of the cause; for if the false statement was corrected, explained or qualified by the witness, so as to make his evidence ultimately consistent with the truth, he was not chargeable with

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perjury in making the false statement. 2 Stark. Ev., 858; 2 Chitt. C. L., 312. Indeed, the false assertion, after being explained or corrected by the witness, formed no part of his testimony, and can not be brought forward to sustain a plea of justification charging him with perjury.

It is also contended that it was erroneous to instruct the jury that if the defendant charged the plaintiff with false swearing in making a statement which he afterwards, in the course of his testimony, corrected and recanted, it was slanderous, unless the defendant also, at the same time, stated that the plaintiff had made the correction. We perceive no fault in this charge. It has already been seen that a witness who has made an erroneous statement in giving evidence, but who subsequently corrected it, is not guilty of perjury in making such statement. It must, of course, be slanderous to charge him, unqualifiedly, with false swearing in reference to that statement. It amounts to an assertion that the witness swore falsely to a fact not contained in his evidence; for, as has [*510] been remarked, a corrected misstatement *in giving testimony forms no part of the evidence after the correction is made. It is no longer the assertion of a fact. A witness thus circumstanced is entitled to protection from an imputation of perjury, or an unqualified charge of false swearing.

Per Curiam.—The judgment is affirmed with costs.

C. H. Test, for the plaintiff.

S. W. Parker, for the defendant.

DOE, on the Demise of ABBOTT, v. HURD and Others.

VOLUNTARY CONVEYANCE.—A voluntary conveyance of real estate is not void as to subsequent creditors merely because the grantor was indebted \$25.00 or \$30.00 at the date of the deed.

SAME.—After such conveyance, the grantor contracted a debt for which judgment was obtained before the conveyance was recorded. Subsequently to

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recording the conveyance, (which was not recorded in time), the land was sold under an execution on said judgment. *Held*, that the purchaser, having notice by the record of the prior deed, took nothing by his purchase.

CONVEYANCE BY HUSBAND TO WIFE.—A husband can not convey land *immediately* to his wife, but he may convey it to trustees for her use.

EFFECT OF CONVEYANCE AS TO TITLE.—Under the statute, a *bona fide* conveyance of real estate, whether for a consideration or not, passes, *prima facie*, the grantor's interest in the premises, and the possession thereof, to the grantee.(a)

ERROR to the *St. Joseph* Circuit Court.

BLACKFORD, J.—This was an action of ejectment for certain real estate in *St. Joseph* county. Plea, not guilty. The cause was submitted to the Court, and judgment rendered for the defendants.

On the 4th of *September*, 1840, *Levi Dean* became special bail for *A. M. Hurd*, in an action of debt brought by the lessor. On the 25th of *March*, 1841, there was judgment against *Dean* in *scire facias* on his recognizance. On the 21st of *August*, 1841, *Dean's* interest in the premises in dispute was sold on an execution on said judgment to the lessor. The plaintiff relies on the sheriff's deed under this sale.

The defendants rely on a deed for the premises executed to them by the said *Levi Dean*, in trust for his wife, *Polly Dean*, on the 1st of *November*, 1839. The plaintiff contends that this trust deed is not valid.

[*511] *First objection: The deed is voluntary, and was made to defraud creditors. At the date of the deed, the grantor was indebted only in the sum of \$25.00 or \$30.00, which is too small an amount to render it void, without other evidence of fraud, at least as to subsequent creditors. *Lush v. Wilkinson*, 5 Ves., 384; 1 Story's Eq., 348. Besides, there is positive evidence, introduced by the plaintiff, that no fraud was intended. The sheriff swears, that when he took the recognizance, he told *Dean*, in presence of his wife, what *Hurd* had told him, viz., that the premises in dispute were his; and neither *Dean* nor his wife made any answer. This fact, it is

(a) *McCaw v. Burk*, 31 Ind., 56, and authorities there cited.

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said, is evidence of fraud. In answer to this, it may be observed, that another witness of the plaintiff's, *Dean*, swears that no such conversation took place. The question of fraud has been decided by the Circuit Court, and we shall not, under the circumstances, disturb their decision.

Second objection: The lessor is a purchaser for a valuable consideration, without notice of the voluntary conveyance. The answer to this is, that the deed to the defendants was recorded before the sheriff's sale. The circumstance, that the judgment was rendered before the deed was recorded, is not material. Deeds of real estate are not void for not being recorded in time, except as to *bona fide* purchasers for value whose deeds are first recorded. A judgment-creditor can not be considered as such a purchaser; nor can a purchaser under the judgment hold, who has notice, by the record, of the prior conveyance. *Sparks et al. v. The State Bank*, May term, 1845.

There is one other objection. It is, that the trust-deed is void on its face. There is nothing in this objection. A husband can not convey land *immediately* to his wife, on account of the legal unity of their persons; but he may convey it to trustees for her use. 1 Shepp. Touchstone by Prest., 205, note 10. It is contended, that the words in this deed are not sufficient to create a trust for the wife. But if that be so, it can not benefit the plaintiff. The deed, at all events, conveys the grantor's interest in the property to the defendants, whether they are trustees or not. We consider that, under our statute, a deed of conveyance of real estate, executed in good faith, whether for a consideration or not, passes, *prima* [*512] **facie*, the interest of the grantor in the premises, and the possession thereof, to the grantee.(1)

Per Curiam.—The judgment is affirmed with costs.

J. A. Liston, for the plaintiff.

J. L. Jernegan, for the defendants.

(1) A conveyance of real estate, executed without consideration, is valid against the grantor and his heirs. *Jackson d. Malin v. Garnsey*, 16 Johns. R., 193.

Phipps v. The State.

PHIPPS v. THE STATE.

HIGHWAYS.—In opening a road established by the county commissioners, the supervisor can not deviate from the course of the road so established.

DEDICATION.—No presumption of dedication of uncultivated land of the U. States for a highway, can be raised from the use of such land as a highway by the public.(a)

ERROR to the *Lawrence* Circuit Court.

DEWEY, J.—At the *May* term, 1844, of the *Lawrence* Circuit Court, an indictment was found against *Phipps*, the plaintiff in error, charging him with having, on the first day of *June*, 1843, obstructed a certain public highway, at a particular place in the county of *Lawrence*, by erecting a fence across it, and also with having continued the obstruction. Plea, not guilty; trial by the Court by consent; finding and judgment against the defendant.

It appeared in evidence that, in 1818, the highway named in the indictment was located and established by the board of commissioners of *Lawrence* county; that one *Dougherty* was appointed, in that year, supervisor of that road; that he, as supervisor, opened it generally as established, but that at a particular place he deviated from it, and at a short distance further on joined it again; that the defendant, about two years before the trial (at the *November* term, 1844), obstructed that part of the road opened by the supervisor between the points of departure from, and junction with, the line of the road as located and established by the commissioners, by throwing a fence across it in inclosing his farm, leaving the road as located open and unobstructed; and that “for many years before the defendant entered the land,” the place so obstructed had been used by the public as a highway.

[*513] *We do not think the evidence justified the finding and judgment of the Circuit Court. There was not sufficient proof that the place obstructed by the defendant was

(a) See *Hobbs v. King*, 25 Ind., 352.

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a public road. The highway established by the commissioners did not include it; and, certainly, the opening of it as a road by the supervisor, at a point where he had no authority to act, could not constitute it a legal highway.

But it is urged, that there was sufficient evidence of long continued user by the public, to justify the Circuit Court in presuming a dedication of the place in question as a highway by the owner of the land.

It is true, that twenty years' continued, unexplained, and adverse user of a *private* way, or other easement, over or on the land of a person who acquiesces in the user, raises a presumption that the right so exercised had its origin in a grant. *Campbell v. Wilson*, 3 East, 294; *Daniel v. North*, 11 id., 372. And it may be true, that the unopposed user of a highway by the public, over the land of an individual who is conscious of the fact, for a much shorter period than twenty years, may raise the presumption of a dedication to the public by the owner. *Rugby Charity v. Merryweather*, 11 East, 376, n. But this point does not seem to be settled. The case last quoted, on which the distinction, if there be any, rests, has been shaken by the more recent cases of *Woodyer v. Hadden*, 5 Taunt., 126, and *Wood v. Veal*, 5 B. & Ald., 454. It has, however, been confirmed by a still later decision, in which it was held, that the use of a way by the public for four or five years, was sufficient to raise a presumption of dedication. *Jarvis v. Dean*, 3 Bingham, 447. But there is no occasion to determine this question on the present occasion.

There is no evidence that the defendant, *Phipps*, acquiesced for a moment in the use of his land for a public road. On the contrary, his first act after his purchase from the *United States*, so far as the record informs us, was one of dissent. He erected a fence across the traveled way so as to include it in his inclosure. He certainly never dedicated the place in question to the public. But it is urged, that prior to the defendant's purchase of the land, it had been used many years (probably [*514] ever since 1818, when the supervisor *opened the road) as a highway by the public; that the right of

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the public was therefore perfected; and that the defendant took the land subject to that right. The foundation on which the doctrine of dedication by user rests is, that the owner of the land has for a considerable length of time acquiesced in such user. Anything which shows that there was no acquiescence by him destroys the presumption. 2 Stark. Ev., 525. *Daniel v. North, supra*; *Wood v. Veal, supra*. We do not think that this doctrine of dedication inferred from user, is at all applicable to the extensive uncultivated domain of the *United States*. This domain is not in the actual visible possession of anybody. There is no one to watch and guard against encroachment. It is impossible that the general government should know whether its unseated lands are improperly used for highways or not. There can not, therefore, exist that consent by the owner to the use of his land for a road, from which a dedication can be presumed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

G. G. Dunn, for the plaintiff.

A. A. Hammond and S. Major, for the State.

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NON EST FACTUM.—In debt on a writing obligatory, *non est factum* puts nothing in issue but the execution of the instrument: the other material allegations in the declaration are admitted by the plea.

PRACTICE.—If evidence not material to the issue be introduced, the Court may instruct the jury to disregard it.

APPEAL from the *Boone* Circuit Court.

DEWEY, J.—This was an action of debt by *Vance* against *Utter*. The first count in the declaration, and the only one necessary to be noticed, alleges that the plaintiff and defendant, on, &c., entered into a writing obligatory, whereby it was agreed between them that the plaintiff had, on, &c., sold to the defendant a horse at the price of \$150, to be paid out of the

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avails of a note which the defendant held against one [*515] *McConnell*, of *Tennessee*, for \$325, then *due and payable; which note was to be put in suit, and the first money collected on it to be paid to the plaintiff for the horse, with interest from the date of the writing obligatory; the solvency of *McConnell* to be at the risk of the plaintiff. The count then alleges that *McConnell* was solvent, and that he had paid to the defendant the amount of the note, but the defendant refused to pay for the horse. The defendant pleaded to the first count, that after the execution of the writing obligatory therein mentioned, the same was materially altered, without the knowledge or consent of the defendant, by the insertion of the clause respecting the risk by the plaintiff of the solvency of *McConnell*; and that, therefore, the writing obligatory was not the defendant's deed. The plea was sworn to; and issue upon it. Verdict and judgment for the plaintiff.

It appeared in evidence that the defendant obtained a judgment against *McConnell*, on the note mentioned in the writing obligatory, in *Tennessee*; that the judgment was enjoined there by the Court of chancery; that the injunction was dissolved; that upon the dissolution of the injunction, *McConnell* paid the judgment to the defendant; but before the money was paid, the defendant was required by the proper Court to execute a bond to *McConnell*, conditioned to refund the money should the suit in chancery respecting the judgment terminate in his favor; that *McConnell* did succeed in that suit; and that the defendant repaid the money to him.

The Court instructed the jury, that if they should find from the evidence the writing obligatory had not been altered, as alleged in the plea, the refunding the money by the defendant to *McConnell* could make no difference as to his liability in this action.

The only question in this cause arises from this instruction; and we think it must be decided against the appellant. The special plea of *non est factum* put in issue nothing but the execution of the writing obligatory. All the other material allegations of the first count are admitted by the plea. *Gardner v.*

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Gardner, 10 Johns., 47; *Legg v. Robinson*, 7 Wend., 194. The substance of the agreement set out is, that the defendant should pay the plaintiff \$150, for a horse purchased of him, [*516] out of the first money which should be *collected by the defendant, from *McConnell*, on a certain note; and it is alleged that the money was collected by the defendant, but that he refused to pay for the horse. This was sufficient to entitle the plaintiff to recover, provided the issue of *non est factum* was found for him. If the defendant supposed that his inability to recover the contents of the note of *McConnell* on the merits could avail him in this action, he should have pleaded an appropriate plea. Under the issue as it stood, that the defendant was compelled to refund the money which he collected of *McConnell*, was an immaterial matter. It was not involved in the pleading; and the Court was correct in instructing the jury to disregard it.

Per Curiam.—The judgment is affirmed, with two *per cent.* damages and costs.

W. W. Wick, for the appellant.

A. Kinney and S. B. Gookins, for the appellee.

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PLEADING.—A plea must state facts in a direct and positive form, and not leave them to be collected by inference.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit on a promissory note, payable to one *McMillen*, and by him assigned to the plaintiff. The defendant pleaded as to \$100, part of the sum sued for, matters to show that there was no consideration for that part. Special demurrer to the plea, and judgment for the defendant. For the part of the demand not attempted to be answered by the plea, there was judgment for the plaintiff.

The plea states that when the note sued on was given, the defendant owed *McMillen* \$950; that *McMillen* had previ-

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ously agreed with the defendant to receive in payment of the debt the notes of other persons held by the defendant for an equal amount, upon the same being assigned to him by the defendant; that when the defendant had assigned said notes to *McMillen*, in pursuance of said agreement, and in *517] *discharge of said indebtedness, *McMillen* falsely and fraudulently represented to the defendant that the sum so due from the defendant to him was payable to his, *McMillen's*, wife, and that she would not take the notes so assigned by the defendant unless he would give him, *McMillen*, \$100 for her use; that that was the only consideration for said \$100 of said note, &c.

The plea was specially demurred to, and the following causes of demurrer were assigned: 1, It is not directly, but only argumentatively alleged that the plaintiff received the notes in full satisfaction of the demand. 2, It is not directly, but only argumentatively averred that the notes were assigned by the defendant to the plaintiff. In these causes of demurrer, the word plaintiff instead of *McMillen* is used evidently by mistake.

The plea is no doubt defective in form as pointed out by the demurrer. There are no positive allegations that the notes were assigned by the defendant to *McMillen*, and that the latter received them in satisfaction of the debt. These allegations were essential to the validity of the plea, and the plea contains them substantially, but not in due form. The objection could not have been sustained on general demurrer, but the plaintiff had a right to insist that the plea should be good, not only in substance but in form. The statement in the plea, "that when the defendant had assigned the notes in pursuance of the agreement," &c., implies that he had assigned them, but it is not a direct averment that the defendant had assigned the notes, &c.

Per Curiam.—The judgment for the defendant below is reversed with costs. Cause remanded, &c.

W. W. Wick and *L. Barbour*, for the plaintiff.

W. Quarles and *J. H. Bradley*, for the defendant.

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WOOD v. POWELL and Another.

CONTRACT CONSTRUED—PLEADING—COVENANT.—The declaration alleged that by an agreement of the parties under seal, the defendant had let to the plaintiff a distillery for a year, and was to furnish sufficient meal to keep it running. That the plaintiff was to deliver to the defendant a certain quantity of whisky at the distillery for every ^{*sixty} pounds of meal so delivered; that the defendant was to furnish barrels to hold the whisky; that if the defendant failed, at any time, to furnish meal as aforesaid, the plaintiff might furnish the distillery himself, and have the same rent free, till the defendant should again furnish meal; that if the plaintiff, at any time, failed to pay for the meal as fast as it was delivered or distilled, the agreement should be void; and that the defendant should give the plaintiff ten days' notice of his intention to stop furnishing the meal. Breach, that the defendant had failed to furnish the meal without giving the ten days' notice, &c.

Plea, that the defendant had kept his covenants until the plaintiff's non-performance, as thereafter mentioned, and had furnished the plaintiff with sufficient meal to keep the distillery running, and barrels to hold the whisky; yet the plaintiff had afterwards failed to pay, &c., by delivering the whisky, &c., whereby the agreement became void.

Held, that the declaration and plea were both good.

ERROR to the *LaGrange* Circuit Court.

BLACKFORD, J.—This was an action of covenant brought by *Powell* and another against *Wood*.

The declaration states that in *January*, 1842, the parties made an agreement, under seal, to the following effect: *Wood* let to *Powell* and *Harding* his distillery, dwelling house, and garden for one year; and agreed to furnish sufficient quantities of meal to keep the distillery running at, &c. *Powell* and *Harding* agreed to deliver to *Wood* eight quarts and one pint of good whisky, at the distillery, for every sixty pounds of meal delivered as aforesaid. *Wood* was to furnish his own barrels to hold the whisky. If *Wood* failed, at any time, to furnish meal as aforesaid, *Powell* and *Harding* were to have the privilege of furnishing the distillery themselves, and have the use of the same rent free till *Wood* should again furnish meal. If *Powell* and *Harding*, at any time, failed to pay for the meal as fast as the same was delivered or distilled, the

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agreement was to be void. *Wood* agreed to give *Powell* and *Harding* ten days' notice of his intention to stop furnishing meal as aforesaid. The breach assigned is that the defendant did not furnish sufficient quantities of meal to keep the distillery running at, &c., nor did he, at any time after making the agreement, give the plaintiffs ten days' notice, or any notice at all, of his intention to stop furnishing meal for the distillery; but that, on the contrary, he had failed and neglected to furnish any meal for the distillery at, &c., for 100 days from and after the 5th of *April*, 1842, not having given any *notice whatever to the plaintiffs of his intention to stop furnishing the meal; in consequence of which failure, &c.

There are two pleas. The first is as follows: The defendant kept his covenants until the non-performance as hereinafter mentioned by the plaintiffs on their part, and furnished them sufficient quantities of meal to keep the distillery running, and barrels to hold the whisky. Yet the plaintiffs, afterwards, to wit, on the 1st of *March*, 1842, and thence hitherto have wholly failed to pay, &c., by delivering to the defendant, at the distillery, eight quarts and one pint of good whisky for every sixty pounds of meal delivered as aforesaid, whereby the agreement became void.

This plea was specially demurred to; and one of the causes of demurrer is, that the plea does not aver a demand of the whiskey at the distillery. There are some other causes of demurrer alleged, but they are evidently groundless. The Court sustained the demurrer. The second plea was a plea of performance, to which there was a replication in denial.

Verdict and judgment for the plaintiffs.

The declaration is objected to on the ground that the breach is insufficient; but the objection is unfounded. The defendant was bound to furnish the necessary meal for the distillery, with the privilege of ceasing to furnish it upon giving ten days' notice of his intention. The charge is, that he failed to furnish the meal without giving the notice. That shows a good cause of action.

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The plea demurred to is good. The objection made to it, viz., that it does not aver a demand of the whisky, can not be supported. The plea alleges not only that the defendant furnished the meal, but also that he furnished the barrels to hold the whisky, according to his contract: he was not bound to do any thing more. It was for the plaintiffs, afterwards, to deliver the whisky by putting it into the barrels at the proper time, whether the defendant demanded it or not, or whether he was there to receive it or not.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson and *J. B. Howe*, for the plaintiff.

W. H. Coombs, for the defendants.

[*520] *HONENSTINE v. VAUGHAN and Others.

AD QUOD DAMNUM.—In a case of *ad quod damnum*, in relation to the erecting or the continuing of a mill dam, the petition, the writ, and the inquest, or at least the latter, should name all the proprietors of lands, both above and below the site of the dam, who may be or have been, in any way, injured by the dam.(a)

ERROR to the *Allen* Circuit Court.

DEWEY, J.—This was an application for a writ of *ad quod damnum*. The petition sets forth that *Honenstine*, the petitioner, was the owner of a mill and dam, already erected on certain premises owned by him in fee-simple; that the dam was across the *St. Mary's* river; that *O. Vaughan*, *Small*, *J. Vaughan*, and *Drage*, were respectively the owners of certain tracts of land (describing them) lying on the river above the dam; that those persons complained that the lands described were injured by the overflow of water occasioned by the obstruction, and that they (the persons) were otherwise injured;—wherefore the petitioner prayed for a writ of *ad quod damnum*,

(a) *Lane v. Miller*, 17 Ind., 58.

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to be directed to the sheriff, requiring him to summon a jury to meet on the several tracts of land described in the petition, and to inquire into and assess the damages done to their respective owners; and for further relief, &c. A writ issued accordingly, commanding the sheriff to summon a jury to meet on a certain day therein named, on the several tracts of land named in the petition, (describing them), and to inquire into and assess the damages to the lands which had been or might be done in consequence of the dam; whether the mill was of public utility; and whether the health of the neighbourhood had been or would be affected by the stagnation of the water obstructed by the dam, &c. The petitioner gave written notice to the persons named in the petition, of the issuing of the writ, and of the time and place appointed for the meeting of the jury. The sheriff returned the writ with his doings thereon, and the inquest of the jury. The inquest showed, that the jury assessed certain damages to two of the persons named in the petition and writ, for the injury done to their lands respectively therein described; and to the other two persons named in the petition

and writ they awarded no damages, having found that
[*521] their *lands described therein had sustained no injury.

The jury further found that the petitioner's mill was of public utility; that the health of the neighbourhood was not affected; that the passage of fish was not obstructed; that the navigation of the river was not injured for more than two months in the year, and that that difficulty might be obviated by a slope; that neither the mansion-houses, offices, curtilages, nor gardens, of the persons named in the petition and writ, would be overflowed or injured in consequence of the dam. The sheriff gave legal notice to the four persons named in the inquest, whose premises had been viewed by the jury. Those persons appeared in Court, and moved that the proceedings might be dismissed, which was accordingly done, and a judgment for costs rendered against the petitioner.

The legality of the dismissal is the only question raised by the record. It would, perhaps, be sufficient to show why the judgment should not be reversed, to remark that it does not

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appear by the record on what ground the Court dismissed the cause. The statute authorized the dismissal, provided the Court was satisfied by evidence independently of the inquest, that the mill or its appurtenances, or the mansion-house, curtilage, or garden of any person, were overflowed or injured by the obstruction of the water; and for aught the record shows such evidence was given.

But there were other sufficient grounds for dismissing the proceeding. The petition, the writ, and the inquest were all defective. It is to be gathered from the statute on the subject of these writs of *ad quod damnum*, that if a person owning land on both sides of a water-course proposes to erect a dam, or is the owner of one already erected, and wishes to have the damages, which have been or may be occasioned by his dam, assessed, he may apply for a writ directing the sheriff to summon a jury for the following purposes: 1, To examine the lands of persons other than the petitioner, lying above and below the site of the dam, which probably may be or actually have been overflowed, or otherwise injured, by reason of the obstruction of the water, and to ascertain the amount of the damages which each of such persons (naming him) may sustain or has sustained; and to find whether the mansion-house, office, curtilage, or garden of such person will [*522] *be or has been overflowed, as the case may be; 2, To inquire whether, and in what degree, fish or passage, or ordinary navigation, will be or are obstructed; and whether the health of the neighborhood will be or is injured; 3, Whether, and by what means, such obstruction can be prevented; and, 4, Whether, in the case of a mill already erected, the same is of public utility. R. S., 1843, p. 944.

It is evident that the petition, the writ, and the inquest, or at least the latter, to comply with all these provisions, must embrace all the proprietors of land, both above and below the site of the dam, who may be or have been, in any way, injured by it. But in the case before us, neither the petition, the writ, nor the inquest, does embrace all such persons. On the contrary, the petition commences by praying for a writ to summon

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a jury, to inquire of the damages done to certain lands above the dam (describing them) belonging to certain individuals; and it neither negatives the fact that other proprietors are injured, nor alleges that those named had not other lands than those described, which were damaged. The writ and the inquest are equally described.

The Circuit Court committed no error in dismissing the cause.

Per Curiam.—The judgment is affirmed with costs.

D. H. Colerick and *J. G. Walpole*, for the plaintiff.

S. Bigger, *R. Brackenridge*, *W. H. Coombs*, and *I. H. Kiersted*, for the defendants.

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ASSUMPSIT will not lie on a specialty.

MISJOINDER.—In case of a misjoinder of actions, there should not be a separate demurrer to each count, but one demurrer to the whole declaration.

ASSIGNMENT OF CONTRACT.—A written promise of indemnity, whether under seal or not, is, under the statute, assignable.

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—Assumpsit by *Fletcher* and *Butler* against *Piatt* and two others. In the commencement of the declaration, the plaintiffs complain of the defendants in a plea of trespass on the case upon promises. There are three counts.

[*523] *The first count alleges that, on, &c., the defendants, in consideration that one *Hand* would, at their request, become docket bail for the stay of execution on a certain judgment against one *Evans* in favour of one *Drake*, recovered before a certain justice of the peace (particularly describing the judgment), promised *Hand*, that they would indemnify him against all liability as such bail, and against the payment of the judgment or any part of it; and then and there executed under their hands and seals, and delivered to *Hand*, a certain “written indemnity in the words and figures

following: 'We do hereby indemnify *Charles I. Hand* from any liability and from the payment of a judgment (describing it as before), on which judgment said *Hand* is the bail, for the stay of execution, for said *Evans*.'" The signatures and seals of the defendants follow. The count then proceeds to state that *Hand*, confiding, &c., did become bail for the stay of execution on the judgment; that the necessary steps having been taken to collect the money of *Evans* without success, *Hand* was obliged to pay it, (showing the amount); that *Hand* assigned the writing obligatory to the plaintiffs; and that the defendants failed to pay *Hand* or the plaintiffs the money so paid by *Hand*.

The second count is that the defendants, on, &c., in consideration that *Hand* at their request had become bail, &c., (describing the same judgment), "by their certain other written undertaking, under their hands and seals, undertook and then and there promised," &c., setting out the substance of the same writing obligatory according to its legal effect, and proceeding to allege the compulsory payment of the judgment by *Hand*, the assignment of the instrument, and the breach, as in the first count.

The third count differs from the others only in setting out the promise of the defendants to have been by a simple written contract.

Piatt, being the only defendant on whom process was served, demurred separately to each count. The demurrers were sustained. Judgment for *Piatt*.

The demurrers to the first two counts were well taken. Those counts are in *assumpsit* on a specialty, which is not admissible. 1 Chitt. Pl., 99, 103. Whether they [*524] contain *other defects it is unnecessary to inquire.

The plaintiffs in error contend, that the writing obligatory mentioned in the first count is only stated by way of inducement, and is not the promise on which that count is founded. We think otherwise. A simple contract is indeed stated, but it is shown to have been merged in the specialty. If, however, it were admitted that the sealed instrument is not

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the foundation of the action, it would not aid the plaintiffs in error; *that* is the only contract alleged in the first count to have been assigned by *Hand* to the plaintiffs below. They show title to no other cause of action.

The demurrer to the third count should have been overruled. That count is founded on a written contract not under seal, and *assumpsit* was the proper form of action.

But it is contended that the judgment must nevertheless be affirmed, because there is a misjoinder of actions, the first two counts being, as is alleged, in covenant. Had there been such misjoinder, there should not have been separate demurrers to each count, but one demurrer to the whole declaration. 1 Chitt. Pl., 205. But there is no misjoinder of actions; there is a joinder of two bad counts with one good one, all in *assumpsit*.

It is also contended that the judgment is right, because none of the instruments described in the declaration is assignable. We have carefully examined the statute, and think that a covenant, or a written promise, of indemnity—and such is the character of the instruments in question—comes within its provisions, and is assignable. R. S., 1838, pp. 118, 119; R. S., 1843, p. 576.

The judgment must be reversed for the error committed in sustaining the demurrer to the third count.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory and *D. Brier*, for the plaintiffs.

S. S. Brier for the defendant.

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*McDONALD v. HAGINS.

INDIANA UNIVERSITY.—Each county in the State has a right to send two students to the *Indiana* University, to be instructed, free of tuition fees, in the law department as well as in the other departments of the institution.

ERROR to the *Monroe* Circuit Court.

BLACKFORD, J.—Assumpsit brought by the plaintiff in error for money paid, &c. Plea, the general issue. The cause was submitted to the Court; judgment rendered for the defendant; and a new trial refused.

The following are the facts as shown by the record: The plaintiff was professor of law in the *Indiana University* from *June*, 1842, till the time of the trial, and taught in the law department of said University during the sessions ending *February* the 28th, 1844, and *February* the 28th, 1845. At both those sessions the defendant was a pupil. The terms of tuition in said department, as fixed by the board of trustees, have always been \$15.00 per session, payable in advance to the treasurer of the University. Every professor, by an order of the board, who receives into his department any student who has not paid the tuition in advance, is liable to pay the same himself. The defendant did not pay the tuition fee for either of said sessions, but did, before entering as a student at each of those sessions, present to those to whom it was proper to present it, a copy of the record of the board of commissioners of the county of *Jennings*, in this State, duly authenticated. This copy of said record showed that the board of commissioners had, at its *September* term, 1843, authorized and appointed the defendant to be a student from the county of *Jennings*, in said University, during said law sessions, and was in all respects sufficient to authorize the defendant to be a pupil, during said sessions, free of charge in all the departments of the University except the law department, and in that department also, if the statute authorizing the county boards in this State to appoint two students to enter the University free of tuition fees, applies to the law department. The defendant not having paid the tuition fees, the plaintiff paid them to the treasurer.

According to the laws of the State, each county has [*526] a right *to send two students to the *Indiana University* free of all charges for tuition; and the principal question presented by this case is, whether the right extends to the law department of the institution as well as to the other

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departments. We can see no reason why it does not. The law branch of the University is as much a part of it as any of the others; and a student of the law class, like a student of any of the other classes, is a student of the University.

It appears by an agreement of the counsel, that the session of the law department is not so long as that of the others; and that the board of trustees has passed no order giving to students the privilege of entering the law department free of tuition fees. These circumstances can make no difference. The shortness of the session of the law class only shows, that the privilege in question is enjoyed in that class for a less time than in the other classes. No special order of the board of trustees could be necessary for admission into the law department, nor into any of the others. If any order was requisite, a general one respecting the admission of the privileged students into the University could only be required. It is to be presumed, the contrary not being shown, that such an order had been made.

Per Curiam.—The judgment is affirmed with costs.

C. P. Hester, for the plaintiff.

J. S. Watts, for the defendant.

 JACKSON and Others v. YANDES and Others.

GUARANTEE.—A guarantee directed to Messrs. *Y.* and *B.* may be sued on by *W. B.*, *D. Y.*, and *J. W. Y.*; the declaration averring the promise to have been made to the plaintiffs by the name of Messrs. *Y.* and *B.*

SAME.—In the case of a conclusive guarantee—not a mere overture to guaranty—notice of its acceptance is not necessary.

SAME.—In a suit on a guarantee, whether the notice to the defendant of the principal debtor's non-payment was reasonable or not, is a question for the jury.

PLEADING—PRACTICE.—Where the general issue is pleaded, any other pleas merely amounting to the general issue may be rejected on motion.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *William Barbee*, *Daniel Yandes*, and *James W. Yandes*,

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[*527] *against *Magnus Jackson* and others. The declaration contains three counts.

The first count states that the defendants, on the 25th of *January*, 1843, at, &c., in consideration, &c., promised the plaintiffs, by the name of Messrs. *Yandes* and *Barbee*, to be responsible for certain printing paper which one *N. Jackson* might get from them in case he, *N. Jackson*, should fail to pay for the same; that the promise was to be construed as a continuing letter of credit, and binding on the defendants until countermanded; that thereupon the plaintiffs sold and delivered to said *N. Jackson*, since deceased, on the day and year aforesaid, certain paper as aforesaid, of the value, &c.; that *N. Jackson* did not, in his lifetime, pay for said paper, nor had his administrator since paid for the same, though often requested; of all which premises, the defendants, on the day and year last aforesaid, had notice; that the defendants had not paid, &c.

The second count is similar to the first, except that it sets out the letter of credit *in hæc verba*, which is as follows: "*Lafayette*, *January* 25, 1843. Messrs. *Yandes* and *Barbee*, Gent. Our friend, Dr. *N. Jackson*, is about to engage in the publication of a newspaper in this place, and is desirous of procuring paper from you for that purpose. To enable him to publish such paper, we bind ourselves to you to be responsible for all paper he may get from you in case he fails to pay for the same. This is to be construed as a continuing letter of credit, and binding on us until countermanded."

The third count is similar to the second, except that instead of an averment of notice of the premises to the defendants, it alleges, as an excuse for the want of such notice, the insolvency of *N. Jackson*.

Pleas: 1, Non-assumpsit. 2, To the first count, payment of part by *N. Jackson*, and non-assumpsit as to the residue. 3, Payment by *N. Jackson*. Replications in denial of the payments alleged in the second and third pleas.

The following are the principal facts: *N. Jackson* applied to the agent of the plaintiffs, at their paper mill, to purchase paper on credit, which application was refused. He said he

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could procure the defendants to be his sureties, and was informed that they would do. Soon afterwards he [*528] handed the *above described guarantee to said agent, on the faith of which printing paper was delivered at various times by said agent. On the 31st of *July*, 1843, *James W. Yandes* left the firm of *Barbee, Yandes and Co.*, by which name the plaintiffs did business, and two other persons came in his place. *Jackson* died, and soon afterwards, viz., about the 1st of *February*, 1844, the plaintiffs made a demand of payment of their account on his administrator, and gave notice of the non-payment to the defendants. It was understood generally that *N. Jackson*, from the date of the guarantee till his death, was insolvent; that is, that nothing could be collected from him on execution, although he was, during said time, possessed of considerable personal property.

Verdict for the plaintiffs for \$189.47; motion for a new trial overruled; and judgment on the verdict.

One objection made to this judgment is that the guarantee is not directed to the plaintiffs, but to Messrs. *Yandes and Barbee*. The counts allege that the promise was made to the plaintiffs by the name of Messrs. *Yandes and Barbee*; and that allegation was sustained by proof that the guarantee was delivered to the plaintiffs, and that, in compliance with it, they furnished the paper.

It is also objected to the judgment that no notice of the acceptance of the guarantee was given to the defendants. As this is a conclusive guarantee, and not a mere overture to guaranty, no notice of its acceptance was necessary. *McIver v. Richardson*, 1 M. & S., 557; *Whitney v. Groot*, 24 Wend., 82. We are aware that there is authority to the contrary, but we consider the law to be as we have stated.

The defendants also contend that reasonable notice was not given to them of the non-payment by *N. Jackson*. It was proved that the defendants had notice of the non-payment; and it is decided that whether the notice in such case was reasonable or not, is a mere question of fact for the jury. *Lawrence v. McCalmont et al.*, 2 Howard, 426.

The State, on the Relation of Adams, Adm'r, v. Johnson and Another.

There were several pleas correctly rejected on the plaintiffs' motion: they amounted only to the general issue, which was pleaded.

The Court gave some erroneous instructions to the jury, but they do not affect the merits of the case.

[*529] *The plaintiffs were entitled to a verdict for the balance of their account as it stood on the 31st of *July*, 1843, when a change of partners took place. That balance is \$134.34.

The judgment is for too much, but if the overplus be remitted the judgment can be affirmed; otherwise it must be reversed.

Per Curiam.—A *remittitur* having been entered, &c., the judgment is affirmed.

A. Ingram and *R. Jones*, for the plaintiffs.

R. C. Gregory, for the defendants.

THE STATE, on the Relation of ADAMS, Administrator, v. JOHNSON and Another.

ADMINISTRATOR—WASTE.—If an administrator lend the money of the estate while there are debts to pay, without an order of the Probate Court, and the money be not repaid, he is guilty of waste.

SAME—REVOKING LETTERS.—If a Probate Court revoke letters of administration, it must be presumed, till the contrary appear, that the same Court had granted them.

SAME—SURETY.—For waste committed by an administrator, who has been removed from office, a suit (without a previous judgment against him) may be brought against him and his surety on the administration bond, on the relation of his successor.

ERROR to the *Dearborn* Circuit Court.

DEWEY, J.—This was an action of debt by the State, on the relation of *Adams*, administrator *de bonis non* of the estate of *G. Johnson*, against *M. Johnson* and *Lane*. The declaration contains two counts. The first count is on a bond for \$800. The defendants craved *oyer* of the bond and of the condition

The State, on the Relation of Adams, Adm'r, v. Johnson and Another.

thereof. The condition was, that *M. Johnson* should "truly and faithfully perform the duties and trusts committed to her, as the administratrix of *G. Johnson*, deceased, according to law;" and that she should "faithfully account for, and deliver over, the said estate to such person as the Probate Court of *Dearborn* county should appoint as administrator of said estate." Plea, performance "of all and singular the articles, clauses, payments, conditions, and agreements in the said condition"

mentioned. Replication, that the defendants did not [*530] so perform, &c., but *that *M. Johnson*, as the administratrix of the estate of *G. Johnson*, received \$500 in money belonging to the estate; which sum she negligently and unfaithfully loaned to one *Lane*, reserving no interest, and without an order of the Probate Court authorizing the loan; that she was subsequently removed from the trust of administration by the Probate Court of *Dearborn* county, and the relator appointed in her stead, as administrator *de bonis non* of the estate of *G. Johnson*; that the money so lent to *Lane* never was paid by him either to *M. Johnson* or to the relator; that there were liabilities against the estate, to the payment of which the money should have been applied, and which the relator could not meet for the want of that fund; and that by reason of this diversion of the assets of the estate from their proper use, *M. Johnson* had committed waste, &c. A second breach is assigned, varying from the first only in this, that \$500 are alleged to have been due to the estate on a certain note payable to the deceased, which note *M. Johnson* fraudulently placed in the hands of *Lane* for collection, with an understanding that he should retain the money when collected without interest; that he did collect it and retained it accordingly. The defendants demurred generally to the replication, and the demurrer was sustained.

The second count sets out the condition of the bond, and assigns breaches substantially like those contained in the replication to the plea to the first count, with an additional averment, that the relator had caused *M. Johnson* to be cited before the Probate Court of *Dearborn* county to settle her accounts,

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and that she made default. There was also a demurrer to the second count, which was sustained.

Final judgment for the defendants.

We do not perceive on what ground the judgment of the Circuit Court can be sustained. The matters alleged in the assignment of the breaches of the condition of the bond show malfeasance, or at least negligence, in *M. Johnson* in the discharge of her duties as administratrix. She had no authority to loan the money of the estate without an order of the Probate Court. R. S., 1838, p. 197. And the arrangement by which *Lane* was permitted to retain the money collected by him, which was virtually a loan, was equally unauthorized.

[*531] *Any malfeasance or negligence on the part of an administrator, whereby the assets of an estate are lost, or rendered less valuable, or by which they are diverted from their proper uses to the injury of a creditor, or others interested, is waste, and may be alleged as such in a suit against the administrator and his surety, on his official bond. R. S., 1838, pp. 189, 190. R. S., 1843, p. 559. To loan the money of the estate without authority, while there are debts to pay, is a diversion of the assets from their proper use, and is within the above provision.

The reasons alleged by the defendants in error, in support of the decision of the Circuit Court, are, 1, That the declaration does not show by what Probate Court letters of administration were granted to *M. Johnson*; and that, consequently, it does not appear that the revocation of her letters by the Probate Court of *Dearborn* county was authorized; and, 2, That the recovery of a previous judgment against *M. Johnson* as administratrix should have been shown, to authorize an action on her official bond against her and her surety.

It is true that no Probate Court, except that from which letters of administration emanate, is empowered to revoke them. R. S., 1843, p. 509. But if a Probate Court does actually revoke letters of administration, it must be presumed that the same Court granted them until the contrary appear. And in this case the presumption is strengthened by the con-

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dition of *M. Johnson's* bond, one part of which is, that she should account, &c., to such person as the Probate Court of *Dearborn* county should appoint administrator in her place.

As to the second objection, it is sufficient to answer that the law is express, that on the removal of one administrator, and the appointment of another, the latter may maintain an action against the former on his official bond, for the abuse of his trust by waste, fraud, negligence, or other maladministration. R. S., 1843, p. 544. The statute of 1838, under which the bond on which this action is founded was taken, is substantially the same. R. S., 1838, p. 196. We have already shown that the acts of *M. Johnson*, set out in the assignments of the breaches of the condition of her bond, were a perversion of the assets of the estate from their proper use, and amounted, under [*532] the statute, to waste. We think the action *was well brought, and that the demurrers should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Major and *I. H. Kiersted*, for the plaintiff.

J. Ryman, for the defendants.

BLACK v. WILSON.

PROOF OF INSOLVENCY OF MAKER OF NOTE.—In a suit on the assignment of a promissory note, it appeared that the maker had died on the fifth day of the term of the Court next after the assignment, leaving considerable personal property, but not sufficient to pay his debts; that his real estate, which was sold after his decease, was not sufficient to pay the liens which were on it at the time of his death; that the note, which was previously due, was assigned about the 15th of *December*, 1839, and the next term of the Court commenced in *March*, 1840. The dates of said liens were not shown. *Held*, that the maker's insolvency was not sufficiently proved to excuse the plaintiff for not having sued him. (a)

Held, also, that the circumstance that several suits by other persons against

(a) *Hubler v. Taylor*, 20 Ind., 446.

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the maker had abated at said term, was not sufficient, of itself, to show that the plaintiff could not have obtained judgment against him.

LIEN OF JUDGMENT.—The act of 1838 preserves the liens of judgments in the case of an insolvent estate.

APPEAL from the *Wayne Circuit Court*.

BLACKFORD, J.—This was an action of assumpsit brought by *Wilson* against *Black*. There are two counts. The first is on the assignment of a promissory note executed by one *Fleming* to the defendant, and alleges the notorious insolvency of *Fleming*, at the time of the assignment and until his death, as an excuse for the plaintiff's not having sued him. The second count is for money had and received, &c. Plea, the general issue. Verdict for the plaintiff. Motion for a new trial overruled; and judgment on the verdict.

The only evidence of the maker's insolvency is, that his personal estate at the time of his death, which occurred on the fifth day of the term of the Court next after the assignment was made, was not sufficient to pay all his debt; and that his real estate did sell for enough to pay the liens which were on it at the time of his death. The note, which was previously due, was assigned about the 15th of *December*, 1839, and the next term of the Court commenced in *March*, 1840.

[*533] *The plaintiff, to prove that he could not have obtained judgment against *Fleming* had he sued him, produced the record of the abatement, at said term of the Court, of six suits brought by other persons against *Fleming*. There was no other evidence as to that matter.

The Court instructed the jury as follows: If the plaintiff, by ordinary diligence, would not have been able to obtain judgment against *Fleming*, he is entitled to the same rights against *Black* as if he had brought suit against *Fleming*. And the jury may determine, as to this question, by the fate of the suits brought by others against *Fleming*.

We are of opinion that if the plaintiff, by ordinary diligence, could have recovered judgment against the maker previously to the fifth day of the term, on which day the maker died, he is not excused for not suing. The reason is, that the liens on

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the real estate, their dates not being shown, may in that case have been created after the time when the judgment might have been recovered. And if an execution on the judgment, when so recovered, could have been put into the sheriff's hands before the fifth day of the term, suit should have been brought, because the maker died possessed of considerable personal property, though not sufficient to pay all his debts.

The Court informed the jury, in the latter part of the instruction cited, that they might determine the question as to whether such judgment could have been so recovered by the fate of the other suits. In this, we think, the Court erred. The abatement of the other suits did not, of itself, show that the plaintiff would have failed. The plaintiffs in those suits may not, for instance, have used ordinary diligence. We all know that, under certain circumstances, the judgment might have been obtained, and execution put into the sheriff's hands, before the fifth day of the term. If there were circumstances to prevent such judgment and execution, the plaintiff should have shown them.

The plaintiff contends that a judgment would not have been a lien on *Fleming's* real estate, had it been recovered, and refers to *Berry v. Marshall*, 1 Blackf., 340. That case was decided under the statute of 1821.⁴ But the law is changed.

[*534] The act of 1838, which governs this case, *preserves the liens in the case of an insolvent estate. R. S., 1838, p. 186.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test, for the appellant.

J. S. Newman, for the appellee.

ELLIS v. THE STATE.

NOXIOUS TRADE—NUISANCE.—On the trial of an indictment for establishing a noxious trade, near certain dwellings, &c., the defendant may prove in bar

of the prosecution, under the general issue, that the dwelling-house in the vicinity of the place, &c., was built after the establishment of the alleged nuisance.

ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Indictment for erecting a nuisance. The charge is that the defendant, on, &c., at, &c., near to a certain public highway, and to the dwellings of divers citizens there situate, did erect and put up a certain building for the purpose of steaming the entrails and other offal of hogs; and that he did erect and place in said building divers furnaces, &c., for the purpose of steaming and boiling said entrails, &c., and did, on, &c., unlawfully boil and cause and procure to be boiled, in and by said furnaces, large quantities of the entrails of hogs, &c., by reason whereof divers noisome and unwholesome smells, &c., were emitted, so that the air became impregnated therewith, and was greatly corrupted, &c., to the damage, &c. Plea, not guilty. Jury, and verdict of guilty. Motions for a new trial, and in arrest of judgment, were successively overruled, and judgment was rendered on the verdict.

The motion in arrest of judgment was founded on a supposed defect in the indictment, but we think the objection urged does not exist.

At the trial, one *James Hoagland* was introduced as a witness by the plaintiff, who swore that the dwelling-house of said *Hoagland* was in the immediate vicinity of said nuisance, &c.; the defendant offered to prove by said *Hoagland*, on the cross-examination, in bar of the prosecution, that he, [*535] **Hoagland*, had erected his dwelling-house since the erection of the alleged nuisance, but the Court refused to permit the evidence to go to the jury except in mitigation of damages; to which opinion of the Court the defendant excepted. The Court erred in not permitting the evidence to go to the jury as a full defense against the charge in the indictment. The case of *Rex v. Cross*, 2 Carr. & Payne, 483, is in point. In that case the Court say, "If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses

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within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other."

The Court erred in refusing the testimony for the purpose for which it was offered.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

Z. Baird, for the plaintiff.

A. A. Hammond and *S. Major*, for the State.

[*536] *PARKS v. HAZLERIGG and Others.

APPEAL-BOND—SIGNATURE—Signature is not essential to the validity of an appeal-bond.

ERROR to the *Hendricks* Circuit Court.

SULLIVAN, J.—This was an action of debt on an appeal-bond. The plaintiff declared against *Hazlerigg, Kizer, Russell, and Dugan*; for that the defendants, on, &c., at, &c., by their certain writing obligatory sealed with their seals, &c., acknowledged themselves to be held and firmly bound, &c. On *oyer*, it appeared that the above defendants were named in the bond as obligors. There were four seals affixed to the bond, but it was signed only by *Hazlerigg, Russell, and Dugan*. Opposite to the fourth seal there was no signature. Demurrer to the declaration and judgment for the defendants.

This case presents the simple question, whether it is necessary to the validity of a bond, which has been sealed by the obligor, that it be signed by him also.

At common law, signing was not necessary to the validity of a deed. 2 Blacks. Comm., 305, 6; *Cromwell v. Grunsden*, 2 Salk., 462. To this point it is not necessary to multiply

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authorities. It has been intimated that since the statute of frauds and perjuries, signing, as well as sealing, is necessary, 2 Blacks. Comm., *supra*; but the better opinion seems to be, that the statute has made no alteration in this respect, since it applies only to mere agreements, and not to deeds. 1 Shepp. Touch., by Preston, 56, n. 24; Hurlstone on Bonds, 8. "Signing," says Gresley, in his Equity Evidence, p. 121, in speaking of the execution of a deed, "is not ordinarily essential, but it is always as well to prove it, as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is *prima facie* evidence of sealing and delivery." The common law, therefore, remains unchanged, and signing was not essential to the validity of the bond declared on in this case. If the plaintiff can prove that Kizer, with the other defendants, sealed the bond, the proof [*537] will support the declaration, *which is in the usual form. The Court erred in sustaining the demurrer.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the plaintiff.

CONWELL v. BUCHANAN.

PRACTICE.—Where a cause is submitted to the Circuit Court, the judgment will not be reversed on account of an apparent contradiction in the statements of a witness.

STATUTE OF LIMITATIONS.—A person, to whom an account of more than five years' standing was presented, did not object to the account, but said he thought he had paid it, and had the receipt at home. Held, that this was not a sufficient acknowledgment to take the case out of the statute of limitations.

SAME. PAYMENT.—But a payment, on account of principal or interest, will take the case out of the statute.

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[*538] *ERROR to the *Ripley* Circuit Court.

SULLIVAN, J.—Assumpsit by *Buchanan* against *Conwell* for goods sold and delivered. Pleas, non assumpsit, and the statute of limitations. Issue, trial by the Court by consent of parties, and judgment for the plaintiff.

The account, on which the suit was commenced, was made in *May* and *June*, 1837; the suit was commenced on the 7th day of *April*, 1843. The deposition of a single witness was all the testimony offered on the trial. That witness testified that he then was, and had been ever since the 1st day of *May*, 1837, the clerk and book-keeper of the plaintiff; that the bill of goods attached to his deposition was a true transcript from the plaintiff's books, and that the goods charged in the bill were sold and delivered to the defendant at the prices charged; and that afterwards, as stated in said bill, to wit, on the 20th of *September*, 1838, the defendant paid the plaintiff, on said account, \$60.00 as appeared by the credit given. The witness further stated that, subsequently to the payment of the \$60.00, he met the defendant in *Cincinnati* and reminded him of the account; that the defendant made no objection against the account, but said he thought he had paid it, and had the receipt at home. The witness swore that he was well acquainted with the defendant, and was certain that he was the person who purchased and received the goods charged. To a question by the defendant, on cross-examination, he replied that he would not say whether the defendant was personally present when the goods were sold, nor whether they were sent to him; but that he generally purchased his goods himself.

The plaintiff in error contends that the statements of the witness were so discrepant, that the proof was not sufficient to establish the plaintiff's account, and we are called upon, for that reason, to reverse the judgment. We have repeatedly decided that where testimony is to be weighed, or the credibility of witnesses to be judged of, it is the province of the jury, or the Court if the parties consent, to do it. In this case, although there is an apparent contradiction in the statements of the witness, we think they must be judged of by the

appropriate triers of the fact, and with their determination we can not interfere.

[*539] *The main point for our consideration is whether the plaintiff's proof had the effect to take his case out of the statute of limitations. That it had that effect, two facts are relied on: First, that when the defendant was reminded of the account by the plaintiff's clerk, he did not object to it; and, secondly, that within five years before the commencement of the suit, the defendant paid, on the account, the sum of \$60.00.

We think the first point relied on is insufficient. It is true, the witness says that the defendant did not object to the account, but that was not all. The defendant said that he thought he had paid it, and that he had the receipt at home. To take a case out of the statute, there must be an express promise to pay, or such an admission as that a promise to pay may be implied from it. *Goldsby v. Gentle*, 5 Blackf., 436. But where the acknowledgment of the debt or cause of action is accompanied by words which rebut any presumption of a promise to pay, or is evasive, it will not be deemed sufficient to sustain the action. As, for example, "I owed the money, but I have a receipt in full of all demands: I shall search for it, and let you know in the event of my not being able to find it." *Brydges v. Plumpton*, 9 D. & R., 746; and see *Helling v. Shaw*, 7 Taunt., 608; *Goldsby v. Gentle*, *supra*. We think the language of the defendant in the case under consideration did not amount to an acknowledgment that there was a debt due from him to the plaintiff; nor can a promise to pay be inferred from what he said.

The second point relied on is sufficient to take the case out of the statute. When it is established that there is a debt due from the defendant to the plaintiff on which the statute operates, proof of payment by the defendant, on account of principal or interest, as part performance of the promise laid in the declaration, within five years before the commencement of the action, will take the case out of the statute; for such a payment is deemed an acknowledgment and recognition of the existence

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of the cause of action, and to be equivalent to a new promise. *Chippendale v. Thurston*, 4 C. & P., 98; *Wyatt v. Hodson*, 8 Bingh., 309; *Hooper v. Stevens et ux.*, 7 C. & P., 260; *Evans v. Davies*, 4 A. & E., 840. This has ever been the [*540] rule; and it remains *unaffected in *England* by the recent statute which requires a promise to pay, under other circumstances, to be in writing. 4 C. & P., *supra*. The plaintiff's case, therefore, is taken out of the statute by proof that the defendant did, within five years before the commencement of the suit, pay a part of the debt, and so recognize the existence of the plaintiff's demand, and impliedly promise to pay it.

Per Curiam.—The judgment is affirmed with costs.

E. Dumont, for the plaintiff.

O. H. Smith, for the defendant.

HAYS v. WALKER.

USURY.—*Held*, that if a promissory note for \$350, made by *A* to *B* without consideration, and indorsed by the latter for the purpose of procuring money on it, was purchased of them by *C*, with notice of the facts, for \$300, the transaction was usurious.

SAME.—*Held*, also, that *C*, in such case, though the purchase were made before the act of 1843 respecting interest, might, since that act, recover from the indorser the \$300 paid for the note.

ERROR to the Dearborn Circuit Court.

SULLIVAN, J.—Assumpsit by *Hays* against *Walker*. The declaration contains ten counts. The first nine are upon the indorsements of several promissory notes by *Walker* to *Hays*; the tenth is a count for money lent and advanced. The special counts show that one *Baldwin* and another made and delivered to *Walker* the promissory notes mentioned in the counts; that *Walker* assigned them to *Hays*; and that *Hays*, although he used due diligence by suit, &c., failed to recover from the

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makers. Plea, non-assumpsit. The defense set up was usury. Verdict and judgment for the defendant.

The only error complained of arises upon the instructions to the jury. The instruction alleged to be erroneous is as follows, viz.: That if the makers of the notes made and delivered them to *Walker* without any consideration, that they might be indorsed by *Walker* to give them credit, and *Walker* did indorse them to enable the makers to raise money on them, and *Hays* purchased them afterwards from the makers [*541] *and indorser, knowing that they were so gotten up and for the purpose aforesaid, for the sum of \$300, (the notes being for the sum of \$350), the transaction is colourable and usurious; and the plaintiff can not recover even the amount which he paid for the notes.

The Court was correct in instructing the jury that if the facts were as above stated, the transaction would be usurious. But the Court erred in instructing the jury, that the plaintiff could not recover even the amount which he paid for the notes. The obvious meaning of the latter instruction is, that the plaintiff could not recover the principal sum loaned by him; for the amount that he paid for the notes was a loan of so much money. The instruction was given under the supposition that the 29th sect. of the act of 1843, (R. S., 1843, p. 581), did not apply to the contracts previously entered into; but this Court has heretofore decided otherwise. At the last term it was decided, in the case of *Andrews v. Russell et al.*, that the statute had a retrospective operation, and that it was constitutional. The instruction according to that decision, was erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the plaintiff.

E. Dumont for the defendant.

Vaneman v. Fairbrother and Others.

VANEMAN v. FAIRBROTHER and Others.

DISMISSAL OF CAUSE.—A complainant in chancery moved the Court to dismiss the bill “without prejudice:” the Court refused so to dismiss the bill, but dismissed it “with prejudice.” *Held*, that the dismissal would be no bar to another suit for the same cause. *Held*, also, that a writ of error would not lie on the dismissal.

ERROR to the *Kosciusko* Circuit Court.

DEWEY, J.—This was a bill in equity brought by *Vaneman* against *Fairbrother* and others, the defendants in error, at the April term, 1843, of the *Kosciusko* Circuit Court. The bill prayed for a certain injunction, and for certain other relief. A temporary injunction was granted at that term; and *Fairbrother's* answer was filed at the same term. At the [*542] *next term the injunction was dissolved. The cause was continued from term to term, until the October term, 1844. In the vacation of the preceding term, the complainant dismissed his bill in the clerk's office. At the last named term the complainant, having paid the costs, moved the Court to dismiss the bill “without prejudice.” The Court refused to permit it to be dismissed with that qualification, but dismissed it “with prejudice.” The complainant prosecutes this writ of error, and contends that it was erroneous not to dismiss the cause in the form asked for by him.

There is nothing in our statutes on the subject of dismissing a bill in chancery, either in term or vacation, except a provision that, when a decree shall have been reversed by this Court and remanded to the Court below with instructions, the complainant may, nevertheless, dismiss his bill in that Court, upon the payment of costs, without prejudice to his legal or equitable rights. R. S., 1843, p. 635. The dismissal of the bill in the clerk's office, therefore was unauthorized, and amounts to nothing.

But, independently of any statutory provision, a plaintiff in equity has absolute control over the suit until the decree, and may, previously to that event, dismiss his bill in Court at his

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pleasure. 1 Smith's Ch. Pr., 312; *Handford v. Storie*, 2 Sim. & Stu., 196. But such dismissal does not operate like a decree of dismissal on final hearing, and can not be pleaded in the same manner; it operates only in the nature of a nonsuit at law, and does not bar other proceedings for the same cause, either at law or in chancery. 1 Smith's Ch. Pr., 334; *Brandlyn v. Ord*, 1 Atk., 571; *Countess of Plymouth v. Bladon*, 2 Vern., 32. Such a dismissal is all that the record shows in the present case. Had the order of dismissal contained the words "without prejudice," as desired by the complainant, it would have afforded no more security to his rights than it would without them; and the insertion of the words "with prejudice," as insisted on by the Court, does not render the order of dismissal peremptory, like a decree of dismissal on the merits. Either set of words is unmeaning in an order of dismissal, on the motion of the complainant, without a final hearing, as it would have been, had the cause

[*543] *been dismissed on motion of the defendants, for want of prosecution.

It follows that this Court has no jurisdiction of the cause. There was no decree, interlocutory or final, on which to found a writ of error. A plaintiff in equity can no more prosecute a writ of error upon an order of dismissal of the bill, procured on his own motion, than could a plaintiff at law upon his own voluntary nonsuit.

Per Curiam.—The suit is dismissed for want of jurisdiction.

D. D. Pratt, for the plaintiff.

J. W. Chapman, *A. L. Osborn*, and *J. B. Niles*, for the defendants.

SUTTON v. HAYS.

CONTINUANCE.—In trespass against *A*, *B*, and *C*, the two former appeared to the action, and the writ was returned "not found" as to *C*. Held, that the plaintiff was entitled to a continuance, in order that process might be served on *C*.

Farlow v. Kemp.

ERROR to the *Clark* Circuit Court.

BLACKFORD, J.—This suit was commenced by *Sutton* against *Hays*, one *Guernsey*, now deceased, and one *Joseph T. Martin*. It was an action of trespass for an assault and battery and false imprisonment. At the next term after the writ issued, *Hays* and *Guernsey* appeared and pleaded not guilty. The writ being returned “not found” as to *Martin*, the plaintiff moved for a continuance, that he might have *Martin* before the Court. The motion was overruled. The cause, as to *Hays* and *Guernsey*, was tried by a jury. Verdict and judgment for the defendants.

We think the plaintiff was entitled to a continuance. He had brought a joint suit against three defendants, and the writ as to one of them was returned “not found.” The statute gave him the right, after such return, to proceed against the others; but he was not bound so to proceed. The cause should have been continued, to give the plaintiff an opportunity to have process served on *Martin*.

DEWEY, J., having been concerned as counsel, was absent.

[*544] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

H. P. Thornton, for the plaintiff.

FARLOW v. KEMP.

ASSUMPSIT.—To maintain an action of assumpsit, it must be shown that the consideration for the promise moved from the plaintiff.(a)

ERROR to the *Parke* Circuit Court.

SULLIVAN, J.—Assumpsit. The declaration contains three counts, all of which are special. The first states that, on, &c., the defendant made his certain instrument of writing, by

(a) *Beals v. Beals*, 20 Ind., 163.

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which he acknowledged that he had received from one *Michael Farlow*, of *Randolph* county, *North Carolina*, the sum of \$300, to carry and pay over to the plaintiff, *Joseph Farlow*, residing in *Orange* county, *Indiana*, (unavoidable accidents excepted), &c.; that the defendant did then and there receive, from the said *Michael Farlow*, the said sum of money, to be carried to the plaintiff, and to be paid to him as aforesaid. Yet the defendant, although often requested, had not paid nor delivered the same to the said *Joseph Farlow*, the plaintiff, &c. The second count is, that on, &c., at, &c., the defendant made his certain other instrument of writing, and thereby acknowledged that he had received from one *Michael Farlow*, of *North Carolina*, \$300, to carry and pay over to *Joseph Farlow*, the plaintiff, of *Orange* county, *Indiana*; and that the defendant, for a certain reasonable hire and reward to be therefor paid by the plaintiff, accepted and received the said sum of \$300 from *Michael Farlow*, and in consideration of said hire and reward to be paid to him by the plaintiff, undertook and then and there promised (not saying whom) to carry and convey the said sum of money from the county of *Randolph*, in the State of *North Carolina*, to the county of *Orange* aforesaid, and to pay the same to the plaintiff, unavoidable accidents excepted, &c. The third count states that, on, &c., at, &c., in consideration that one *Michael Farlow*, of *Randolph* county, *North Carolina*, would and did deliver to said defendant the sum of \$300, [*545] *and in consideration of certain reasonable hire and reward to be paid by the plaintiff to the defendant, he, the defendant, then and there accepted and received the said sum of \$300, and then and there undertook and promised (as in the second count) to convey the same to the plaintiff in *Orange* county, *Indiana*, and to pay the same to the plaintiff, &c. To each of the counts a special demurrer was filed. The demurrers were sustained, and judgment was given for the defendant.

The liability of the defendant for failing to perform his undertaking is not denied. The point of controversy is, to whom is he liable? Unless it appear that there was a con-

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tract express or implied between the plaintiff and the defendant, this suit can not be maintained; for where there is no privity of contract, no action lies.

As to the first count, we think it very clear that the plaintiff was a stranger to the consideration of the contract set out in it. It is nothing more than an acknowledgment by the defendant, that he had received from *Michael Farlow* the sum of \$300, to be carried from *North Carolina* to *Indiana* and paid to the plaintiff. The contract was with *Michael Farlow*, the money was his, and it does not even appear that he was indebted to the plaintiff, nor that the plaintiff would have been benefited by the money being paid to him. It is a general rule in all actions upon contracts, that the consideration of the promise must move from the plaintiff, or he can not maintain an action upon it. As in the case of *Price v. Easton*, where the declaration stated that one *William Price* was indebted to the plaintiff in the sum of £13 for certain property sold and delivered, and that the defendant, in consideration thereof, and in consideration that the said *William Price*, at the request of the defendant, had undertaken and faithfully promised the defendant to work for him, the defendant, at certain wages agreed upon between them, and in consideration of *William Price* leaving the amount which might be earned by him in the defendant's hands, he the defendant, undertook and promised to pay to the plaintiff the said sum of £13. There was an averment that *William*

Price did work for the defendant and earned a large [*546] sum of money, and left the same in the *defendant's hands, and that the defendant had failed and neglected to pay £13 of said money to the plaintiff. The plaintiff having obtained a verdict, the judgment was arrested, because the declaration did not show any consideration for the promise, moving from the plaintiff to the defendant. 4 Barn. & Adol., 433. So, where a bill of exchange, payable at the house of the defendants, had been there presented for payment and dishonoured, and the acceptor afterwards remitted to the defendants a sum of money, for the purpose of enabling them to pay the dishonoured bill, and also another of less value, and the defendants

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in answer stated the fact of the bill having been dishonoured, but added that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill; it was held that the holder of the original bill could not maintain an action against the defendants, there being no privity of contract between them. *Yates et al. v. Bell et al.*, 3 Barn & Ald., 643. The cases of *Howell v. Batt*, 5 Barn. & Adol., 504. *Williams v. Everett*, 14 East, 582, *Sims et al. v. Brittain et al.*, 4 Barn. & Adol., 375, assert the same doctrine. All of the cases referred to apply to the first count, and we think are conclusive against its sufficiency. See, also, *Salmon v. Brown*, 6 Blackf., 347.

The second and third counts are also insufficient. The contract, as stated in those counts, was made with *Michael Farlow*, and, for aught that appears, for his benefit. True, it is stated, that for a certain reasonable hire and reward to be paid by *Joseph Farlow*, the plaintiff, the defendant promised to carry the money and pay it to the plaintiff. But it does not appear that the contract was made with the assent of *Joseph Farlow*, or that he was bound by it; nor that he had any knowledge whatever, until this suit was commenced, that such a contract was in existence. It was a contract, therefore, with *Michael Farlow*, that *Joseph Farlow* should pay a reasonable compensation for the defendant's services; and the promise, that the money should be safely carried and paid over, was made to him. The cases above cited show that the second and third counts, like the first, can not be sustained. There are cases which appear, at first view, to conflict with the doctrine above stated; but they will be found on examination not to

[*547] conflict. In *Lilly v. Hays*, 5 Adol. & Ellis, 548, where a debtor of the plaintiff transmitted a sum of money to the defendant, who admitted having received it, and being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it, and the statement, by his authority, was communicated to the plaintiff, it was held that, on his failing to pay, the plaintiff might sue him for money had and received, and that the defendant could not allege a

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want of consideration moving from the plaintiff to himself. But in that case it appeared expressly, that the plaintiff was the creditor of the person remitting the money, and the decision was put upon the ground the defendant had admitted the receipt of the money on the plaintiff's account, and that an agency was created which supplied the consideration. The principle to be collected from the case last cited, and from similar cases, is, that where a party brings a suit in his own name, on a contract made with another person for his benefit, he must, in order to maintain his suit, show a relationship, as, for example, of debtor and creditor, principal and agent, &c., to exist; or prove an express promise to pay the money. See *Arnold et al. v. Lyman*, 17 Mass. R., 400.

The declaration before us is entirely wanting in the necessary averments, to enable the plaintiff to maintain this action; and the demurrers were therefore properly sustained.

Per Curiam.—The judgment is affirmed with costs.

A. Kinney and S. B. Gookins, for the plaintiff.

W. P. Bryant, J. A. Wright, and S. F. Maxwell, for the defendant.

DIXON v. BOYER.

PRACTICE.—Suit by notice and motion, under the act of 1838, against a sheriff for not returning an execution. Judgment by default, damages assessed by a jury, and final judgment for the plaintiff. In the judgment, the Court stated that it appeared to their satisfaction that notice of the motion had been served on the defendant ten days, &c. *Held*, that there was no error in the proceedings.

[*548] *ERROR to the *Clark* Circuit Court.

SULLIVAN, J.—This was a proceeding by notice and motion, under the 29th sect. of the act of 1838 subjecting real and personal estate to execution, commenced by *Boyer* against *Dixon*, sheriff of *Greene* county, for failing to return an execution, issued and directed to him from the *Clark* Cir-

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cuit Court. The defendant having failed to appear, judgment was taken against him by default, and a jury was impaneled to assess the plaintiff's damages. Final judgment for the plaintiff.

The special errors assigned are, 1st, That it does not appear from the record that the plaintiff in error had notice of the suit; and, 2d, That the jury that assessed the damages was not impaneled according to law.

The Circuit Court, in the judgment we are reviewing, say, that it appeared to their satisfaction that notice of the motion had been served on the defendant ten days before the first day of the term at which the judgment was rendered; and the only question as to the first error assigned is, whether that is sufficient to show that the defendant had notice, or whether the return itself is a necessary part of the record to prove the fact.

The decisions of this Court heretofore made are to the effect, that, in a judgment by default, it must appear by the record that the defendant had notice of the suit, otherwise the judgment against him will be erroneous. 4 Blackf., 169; 5 Id., 332. But we do not think it material, whether the fact appear from the return to the writ or notice set out *in hæc verba* in the record; or whether it appear from the substance of it set out in the judgment of the Court. In either case, the fact is shown by the record, and that is all that is required. If the Court were satisfied of the fact, and so express themselves, the presumption is, in the absence of evidence to the contrary, that the proof of the fact was legal and sufficient. The first error complained of, therefore, is not well assigned.

The second we think is also unavailing. It was proper that the Court, in such a case as this, should inquire of the damages by a jury; and we see no irregularity in impaneling the jury, nor is any pointed out to us.

[*549] **Per Curiam*.—The judgment is affirmed with costs.

J. S. Watts, for the plaintiff.

J. H. Thompson, for the defendant.

Murray v. Buchanan, Administrator.

MURRAY v. BUCHANAN, Administrator.

DEATH OF EXECUTION-DEFENDANT.—If after the issuing of a *fi. fa.* by a justice of the peace, and before its execution, the plaintiff die, the writ may still be executed; and if the justice afterwards prevent its execution, he may, for any loss thereby caused to the estate of the deceased, be sued in case by the administrator of such estate.(a)

LOST PAPER—PROOF OF CONTENTS.—The contents of a paper can not be proved by secondary evidence, unless its loss or destruction be positively proved, or it appear that *bona fide* and diligent search had been made for it in vain, where it was likely to be found.

SAME.—And, in general, the loss of the paper must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced, if he be living.

ERROR to the *Huntington* Circuit Court.

SULLIVAN, J.—Case by *Buchanan*, administrator of *Topley Gaunt*, deceased, against *Murray*, commenced before a justice of the peace. The plaintiff, in his cause of action, alleges that *Gaunt*, in his lifetime, recovered a judgment against one *Harlan* before the defendant, who was a justice of the peace, and caused an execution of *fi. fa.* to issue on the judgment; that before the execution was levied, and before the return-day, *Gaunt* died, whereupon the defendant ordered the constable to return the execution, and it was returned accordingly; that at the time of such order, *Harlan* had sufficient property to pay the debt, but that he has since become insolvent, and is wholly unable to pay the same; wherefore, &c. Plea, the general issue. Judgment for the plaintiff.

It is questionable whether the plaintiff could have supported an action, at common law, for the injury set forth in his statement, when the plea was not guilty; but we believe it is now settled, that for any description of injury to the personal property of the deceased, whereby it is rendered less beneficial to the executor or administrator, done even before administration of the personal estate is granted, he may recover for the injury, notwithstanding the action is in form *ex delicto*. 1 Chitt. Pl., 79.

*(a) *Doe v. Hooges*, 4 T. R., 117.

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[*550] *The plaintiff in error contends, however, that no injury was done to the administrator by ordering the execution to be returned, because, as he says, when the execution-plaintiff died, the constable could not proceed with the execution of the writ, and it was his duty to return it without levying the debt. The position is not tenable. If the plaintiff die after a *feri facias* sued out, it may be executed notwithstanding, and his executor or administrator shall have the money; or if the plaintiff has made no executor, or administration is not granted, the money must be brought into Court and deposited, until there be a representative to receive it. Cro. Car., 459; *Thoroughgood's case*, Noy, 73, cited by Gould, J., in 2 Ld. Raym., 1073; Salk., 322; 2 Tidd's Pr., 932, 3.

On the trial of the cause, *Wm. G. Johnson* testified that he was the defendant's successor, and that he had possession of his docket and papers. The witness then read from the docket, that had been kept by the defendant, an entry of a judgment in favour of *Gaunt* against *Harlan*, corresponding to that set out in the statement of the plaintiff's cause of action. He also proved by an entry on the docket, that an execution had issued on the judgment. The constable, to whom the writ had been delivered, proved that he had returned it in obedience to the orders of *Murray*. *James R. Slack* was then sworn, who stated that at or about the time this suit was tried before the justice, he made diligent search for the execution, and that it could not be found. He also stated that *Johnson* had searched with him. The plaintiff thereupon offered to prove, by secondary evidence, the contents of the writ, to which the defendant objected, on the ground that the loss of the paper had not been satisfactorily established, but the Court overruled the objection and permitted the contents to be proved.

Where a paper, the contents of which are necessary to be used on a trial, is lost or destroyed, the fact that the paper once existed must be proved; and if positive proof of the destruction can not be had, it must be shown that a *bona fide* and diligent search has been made for it in vain, where it was likely to be found. 12 Johns., 192; 16 Id., 193. And in

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general, the loss of it must be proved by the person in whose hands it was at the time of the loss, or to whose [*551] *custody it is traced, if that person be living. *Rex v. Castleton*, 6 T. R., 236; *Williams v. Younghusband*, 1 Stark. Cas., 139; *Jackson v. Frier*, 16 Johns., 193. We think the plaintiff, in the proof he adduced of the loss of the paper, did not bring himself within the rule. Without advert-
ing particularly to the fact that it does not appear that the search was made in the place where the paper was most likely to be found, it is sufficient to throw a doubt about the case that *Johnson*, in whose custody the law had placed the paper, was in Court and did not testify, nor was he called upon to testify to the loss. He was the proper person, under the circumstances, to prove the loss, and, indeed, the only one who could establish it satisfactorily. On this point, then, we think the Court erred.

We do not decide at this time whether the constable, who returned the execution, as he says, in obedience to the order of the justice, should have been excluded as a witness for the plaintiff on account of his supposed interest in the event of the suit. No objection was made to his admissibility in the Court below, and the point, therefore, is not fairly before us.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

D. H. Colerick for the defendant.

JARRELL and Others v. SNYDER, in Error.

A DEMURRER to a replication because it is argumentative should show how it is argumentative. *Vance et al. v. The State*, 6 Blackf., 80.(1)

In the case of a fine imposed by a justice of the peace for profane swearing, the defendant may appeal to the Circuit Court. R. S., 1838, p. 362, sect. 11.

(1) So, a special demurrer for duplicity must show wherein the duplicity consists. *Smith v. Clench*, 2 Adol. & Ell., N. S., 835.

Thompson, School Commissioner, &c., v. Weaver.

[*552] *THOMPSON, School Commissioner, &c., v. WEAVER.

PLEADING.—A declaration in debt is not objectionable because it claims less than the sum mentioned in the *queritur*.

NOTE PAYABLE TO OFFICER.—A promissory note was payable to J. T., school commissioner of the county of, &c., for the use of congressional township No. 14, &c. *Held*, that J. T. might, under the act of 1843, sue on the note in his own name.(a)

ERROR to the *Parke* Circuit Court.

SULLIVAN, J.—Debt by the plaintiff against the defendant on a promissory note. Special demurrer to the declaration, and judgment for the defendant.

The declaration states that the defendant, on, &c., at, &c., made his promissory note, &c., by which he then and there promised to pay, twelve months after the date thereof, to the plaintiff, by the name and description of *James Thompson*, school commissioner of the county of *Vermillion*, or his successor in office, for the use of congressional township No. 14 north, range No. 9 west, the sum of \$206.08, with interest, &c., for value received; yet the defendant, although often requested, has not paid, &c.

The first objection to the declaration is that the sum demanded in the *queritur* is greater than the sum declared for. The plaintiff, in his declaration, complains that the defendant is indebted, &c., in the sum of \$300, and then sets out the contract as above stated. There is no validity in this objection. It is immaterial that the sums do not agree; and, indeed, it is not necessary to state the sum sued for in the *queritur*, and if it be erroneously stated, it will not vitiate. *Cozine et al. v. Tousey*, 5 Blackf., 46.

The next objection is that there is a variance between the declaration and the note sued on. That objection can not prevail. The note, though it is copied into the transcript, forms no part of the record. The Circuit Court had not, nor has this Court, on a demurrer to the declaration, any means of judging

(a) *Bowman v. The State*, 3 Ind., 552.

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whether there is a variance between the note and the declaration or not.

The point mainly relied on to support the judgment of the Circuit Court is that this suit can not be maintained in the name of the present plaintiff. It is argued that as the note is made payable to him as school commissioner for the use of *the congressional township, the township, which is a corporation, should have brought the suit, as the contract, in legal contemplation, was made with the corporation. Prior to the Rev. Stat. of 1843, the position of the defendant would have been well taken. *Crawford v. Dean*, 6 Blackf., 181. But by s. 108, a. 8, c. 13, of that revision, p. 253, we think the present plaintiff is authorized to maintain the suit in his own name. The section expressly provides, that for all moneys due the congressional township, or district school funds, the county auditor shall cause suits to be instituted in the name of the obligee or payee of the instrument sued on, and the money recovered to be paid to the school commissioner of his county. The intention of the Legislature, by the above enactment, was, it is presumable, to remove all doubts as to who should be the plaintiff on the record in suits like the present, and so to facilitate the collection of the school funds. The Circuit Court erred, therefore, in sustaining the demurrer.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiff.

W. P. Bryant, for the defendant.

 COMPARET and Others v. THE STATE, in Error.

IF in a suit on a bond, there be a variance between the date of the bond described in the declaration, and that of the bond produced on *oyer*, the variance is fatal. *Cooke v. Graham's adm'r*, 3 Cranch, 229.

 Graeter v. Fowler and Another.

DUDLEY v. FISHER, in Error.

A DEFENDANT, by appearing to a suit in a justice's Court and pleading in bar, waives all objections to the form of the process. *Rittenour v. McCausland*, 5 Blackf., 540; *Wibright v. Wise*, 4 Blackf., 137, and note.

[*554] *GRAETER v. FOWLER and Another.

NEW TRIAL.—The plaintiff is not entitled to a new trial on the ground of surprise, occasioned by a witness, whom he called, giving different evidence from that which he expected him to give.(a)

ERROR to the *Knox* Circuit Court.

SULLIVAN, J.—Trial of the right of property. The property claimed was certain articles of merchandise, levied upon as belonging to *Europe Graeter*, by virtue of two executions in favour of the defendants, and claimed by the plaintiff *J. Graeter*. Verdict, that the property was subject to the executions; motion for a new trial overruled; and judgment on the verdict.

The evidence on the trial, all of which is spread upon the record, consisted in part of a bill of goods purchased at *New Orleans*, which included the articles embraced by the verdict of the jury. A question at the trial was, whether the bill was addressed to Mr. *E. Graeter* or to Mr. *J. Graeter*. Testimony was adduced to the point, and the bill itself was produced. *Bruner*, a witness introduced by the claimant, swore that he was in company with *John* and *Europe Graeter* in *Lafayette*, in *July*, 1843; that he went with *John Graeter* to *New Orleans*, and saw him examine and select some groceries at *Knight's*, in *New Orleans*, the day before he left there; that on the next day he went on board a steam boat with *John Graeter*; that

(a) *Todd v. The State*, 213; 11 Ind., 156; 4 Id., 171.

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Graeter received goods on the boat which he claimed as his own; that witness continued with *Graeter* to *Vicksburg, &c.* Other testimony was introduced, but the point to be decided does not require that it be particularly noticed.

The motion for a new trial was supported by an affidavit of the claimant, which was, substantially, as follows, viz.: That he could prove by *William Knight*, merchant of *New Orleans*, that he, the claimant, and not *Europe Graeter*, purchased and paid for the goods in the foregoing bill mentioned; that he, the deponent, went to *New Orleans* in the month of *April*, (about five months before the trial,) and expected to have returned in

June, but was detained until the month of *July*; that [*555] he obtained the name and place of residence of a *justice of the peace, for the purpose of taking the deposition of said *Knight* to be read in evidence in this cause; that, on his return, a notice was served and dedimus taken out, which, with instructions and money to pay expenses, were sent post paid to *New Orleans*, but the depositions were not taken on account of the absence of the justice named in the notice, and for no other cause; he further stated, that he would prove by said *Knight*, that the letter in dispute was a *J.*, according to his mode of writing, and not an *E*; he further stated, that he was altogether surprised at the trial by the evidence of *Bruner*; that *Bruner* had informed him that he would swear that he, deponent, and not *E. Graeter*, had purchased said goods of *Knight*, but on the trial *Bruner* swore only that he saw the goods engaged but not bought; and that, but for said *Bruner's* information as aforesaid, he could have continued the cause.

The only error complained of is, the refusal of the Court to grant a new trial on the foregoing affidavit. The new trial was not asked on the ground of newly discovered evidence, nor on the ground that the Court refused a continuance until the testimony of *Knight* could be obtained. If it had been, the motion would not have been sustained, because the evidence was not newly discovered, nor was a continuance asked until the testimony could be had. The sole ground was, that the plaintiff was surprised by the testimony of *Bruner*. We have

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met with no case where a new trial has been granted, because a witness swore contrary to the expectation of the party that introduced him. If that were a good cause for setting aside a verdict, new trials would be endless; because the unsuccessful party in every suit might allege that his witnesses deceived him. Where there is trick, or where the witness has been tampered with by the opposite party, so that he is influenced to swear falsely, the case may be different. In *Hewlett v. Cruchley*, 5 Taunt., 277, the Chief Justice, on a motion for a new trial, on the ground that the defendant had been surprised by what his witness swore to, says that such a thing was never heard of. We think it would be establishing a dangerous precedent to grant a new trial for the reason urged in this case.(1)

[*556] **Per Curiam*.—The judgment is affirmed with costs. *S. Judah*, for the plaintiff.

A. T. Ellis, for the defendants.

(1) A plaintiff, after a verdict against him, has no claim to a new trial on account of his having been surprised by the defendant's evidence. *Cummins et al. v. Walden*, 4 Blackf., 307.

LAVERTY and Another v. CHAMBERLAIN.

JUDICIAL SALE—PAYMENT.—The statute of 1838 required, that the motion for judgment against a purchaser of property on execution, who had failed to pay for the same, should be made, not by the execution-creditor, but by the officer who made the sale.

SAME—CHANCERY PRACTICE.—A Court of chancery will not compel a purchaser of real estate under a decree, to complete his purchase, until a report of the sale has been made and confirmed.

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—This was a motion by the plaintiffs against the defendant, to show cause why an attachment should not issue against him to compel him to complete a purchase, made by him at sheriff's sale, of a certain lot in *Fort Wayne*. The

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notice, of which service was duly made, states that the lot was sold by the sheriff on a credit, by virtue of a decree of the *Allen Circuit Court* in favour of the plaintiffs against the heirs of one *Bonn*, deceased, and others, the purchase-money to be paid in certain installments (which are set out in the notice); and that at the sale, the defendant became the purchaser at and for the sum of \$500; that he refuses to pay, or to give his notes for the purchase-money, or in any wise to complete the purchase, &c. The Court refused the motion, and dismissed the suit at the costs of the plaintiffs.

It is very manifest that the proceedings in this case are not in conformity with the act to amend the act subjecting real and personal estate to execution, approved *February 4th*, 1832. R. S., 1838, p. 286. By virtue of the provisions of that statute, if a purchaser shall neglect or refuse to pay the purchase-money of any property sold on execution, he shall be liable, on motion by the officer making such sale, to a judgment for the amount of the purchase-money, &c. The remedy [*557] given by that statute is new, and the proceedings *are summary; and the general rule is, that, in pursuing the remedy given by such a statute, the direction of the act must be strictly pursued. The motion in this case was made by the plaintiffs in the execution, and not by the officer that made the sale; and if there be no other law authorizing this proceeding than the statute referred to, the Court did not err in dismissing it.

The plaintiffs in error contend that the Court, irrespective of the statute, had the power to enforce its decree, and should therefore have granted their motion. That a Court of chancery has the power to act upon a purchaser of real estate, sold under a decree of the Court, who refuses to complete his purchase, is undoubtedly true. The power is a necessary and salutary one; for if the Court did not possess it, its decrees, and indeed the Court itself, might be made objects of sport. But we know of no case, in which a Court has exercised the power until the sale has been reported and the report confirmed. In 2 Smith's Ch. Pr., 201, it is said that it is

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necessary that the report be confirmed absolutely, before any steps are taken by the vendor to compel the purchaser to complete; and in 2 Ves., 335, a motion to compel a purchaser to pay in his purchase-money, before the report had been confirmed, was refused. The purchaser has a right to except to the report, as, for example, by showing that the title is doubtful; and if on the argument of the exceptions, the Court is of opinion that the title is doubtful, they will not compel a purchaser to take it. *Wheat v. Hall*, 17 Ves., 80; *Roake v. Kidd*, 5 Ves., 647. So, where there is a deficiency between the quantity of land advertised to be sold, and the number of acres actually sold; or where there is any other misrepresentation, though not sufficient to vitiate the sale, the purchaser is entitled to compensation. 2 Smith's Ch. Pr., 208. Until, therefore, the report is absolutely confirmed, and every question in the cause deliberately settled, it would be inequitable to require the purchaser to part with his money.

In either view of the question then, that is, whether this motion is supported by the statute above cited, or whether the Court, regardless of the statute, had the power to grant it, we think the Court did right in refusing the motion.

[*558] **Per Curiam*.—The judgment is affirmed with costs.
H. Cooper, for the plaintiffs.

W. H. Coombs and I. H. Kiersted, for the defendant.

LACY v. FAIRMAN, in Error.

THE failure of a justice of the peace, in the case of an appeal, to file the papers in the clerk's office in time, is no cause for dismissing the appeal. R. S., 1843, p. 892.

The filing of an appeal-bond with the transcript, &c., in the clerk's office by the justice, in the case of such appeal, is *prima facie* evidence that he had approved of the bond.

STANFIELD and Wife v. FETTERS.

BASTARDY—FOREIGN JUDGMENT.—Debt lies in this State on a judgment rendered in *Ohio* against the father of a bastard child charging him with a certain sum, payable by installments, for the child's maintenance; but the declaration must show that the plaintiff had maintained the child, and thus entitled himself to the money sued for.

ERROR to the *Kosciusko* Circuit Court.

DEWEY, J.—This was an action of debt by *Stanfield* and his wife, *Sarah*, against *Fetters*. The declaration contains four counts. The first count sets forth a certain portion of the statute of *Ohio*, entitled “An act for the maintenance and support of illegitimate children.” The recited portions of the act prescribe the manner of prosecuting the putative father, and the judgment which shall be rendered against him if found guilty. The count then recites proceedings under the statute by *Sarah*, in *Ohio*, and while sole, in the name of the State, against the defendant on a charge of being the father of her illegitimate child; and alleges that such proceedings were had, that the Court of Common Pleas for *Montgomery* county, on, &c., “adjudged that the defendant should stand charged as the reputed father of the said child, and should stand charged with the maintenance thereof in the sum of \$105” (payable [*559] in installments at specified periods, but *without naming to whom); that execution should issue for any of the installments if not paid; and that the defendant should give security for the performance of the judgment, &c. It is then averred that the defendant, having failed to give security, was imprisoned; and that he was finally discharged from imprisonment under the insolvent laws of *Ohio*, without having paid any part of the judgment, which still remained in full force, &c. The three other counts are substantially the same as the first.

The defendant demurred generally to the declaration, and the demurrer was sustained. Judgment for the defendant.

The law of *Ohio*, as recited in the declaration, is the same as

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our statute of 1831, on the subject of the support of illegitimate children; and this Court has decided that a judgment, similar to that in the record, founded on that statute, would support an action of debt by the party entitled to the payments as they became due. *Cooper v. The State*, 4 Blackf., 316. But that party is the person who has maintained the child; and he must show in his declaration how he became entitled to the benefit of the order or judgment for the maintenance of the child. *Harrington et al. v. Ferguson*, 2 Blackf., 42. See, also, *Beeman v. The State*, 5 Blackf., 165. The declaration before us is defective for not showing the title of the plaintiffs to the money adjudged for the support of the child. It does not appear that the plaintiffs, or either of them, have been subjected to any expense or trouble in the care and maintenance of it. The declaration is perfectly silent as to what became of the child, whether it lived or died, or who had the custody and support of it. The demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed with costs.

J. H. Bradley, for the plaintiffs.

HOVEY and Wife v. MORRIS.

HABEAS CORPUS.—A petition, which was sworn to, for a writ of *habeas corpus*, stated that the petitioner was the guardian, &c., of a certain infant; that the infant was the daughter of one A, deceased, and his wife, *Abigail*, who had, after her said husband's death, married *Lorenzo D. Hovey*; that the
 [*560] infant was, by said *Lorenzo* and wife, illegally restrained of her liberty, and detained from the custody of the petitioner. The petition prayed that the writ be directed to said *Lorenzo* and wife, commanding them to have the infant before the Court, &c. The writ was granted accordingly. *Held*, that the facts stated in the petition (which were admitted by a demurrer to be true) were sufficient to authorize the issuing of the writ. *Held*, also, that the act of 1845, entitled "An act for the relief of *Abigail C. Hovey* and *Lorenzo D. Hovey*, of *Carroll county*," supposing it to be a public act, (it not having been pleaded), and to be constitutional, of which no opinion was given, could not benefit the defendants in this proceeding; they not having shown that they had given the security required by that act.

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ERROR to the *Carroll* Circuit Court. The petition in this case prayed that the writ should be directed to *Lorenzo D. Hovey* and wife, commanding them to have the body of the infant, &c., before the Court, &c. The writ was granted accordingly.

BLACKFORD, J.—This was a writ of *habeas corpus*, issued by the *Carroll* Circuit Court, on the petition of *Austin W. Morris*. The petition states that the petitioner is the guardian of the person and property of *Caroline Morris*, an infant of about the age of ten years; that she is the daughter of *Milton M. Morris*, deceased, and his wife *Abigail*, who has, since her said husband's death, married *Lorenzo D. Hovey*; that the said infant is, by the said *Lorenzo* and his said wife *Abigail*, illegally restrained of her liberty, and detained from the custody of the petitioner, in the county of *Carroll*. The petition was sworn to. The writ of *habeas corpus* was directed to the said *Lorenzo D. Hovey* and *Abigail* his wife, &c., and was returnable to the Court on the 25th of *April*, 1845. The defendants, in obedience to the writ, brought the infant into Court, and demurred to the petition. The demurrer was overruled; and the defendants refusing to withdraw the demurrer and answer the petition, the Court ordered the infant to be delivered to the petitioner.

The defendants, instead of demurring to the petition, should have moved to quash the writ of *habeas corpus*, on the ground of the alleged insufficiency of the petition. But the form of the proceeding is not now material. The question raised by either course is the same, viz.: was sufficient cause shown to authorize the issuing of the writ? That question was decided in the affirmative; and the defendants showing no cause for detaining the infant, she was delivered to her guardian.

[*561] *As the facts stated by the petition are admitted by the demurrer, we see no reason for objecting to the opinion of the Court. After the second marriage of the mother, another person might be appointed guardian of the person of the infant, according to the act of 1843. R. S., 1843, p. 608. The petitioner alleges himself to be the guardian

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of the person and property of the infant, which allegation can only mean, that he is the legally appointed guardian of her person and property.

The defendants rely on the statute of *January* the 13th, 1845, entitled "An act for the relief of *Abigail C. Hovey* and *Lorenzo D. Hovey*, of *Carroll* county." Supposing that act to be a public one (it not having been pleaded), and that the same is constitutional, of which we give no opinion, still it can not benefit the defendants in this proceeding in the Circuit Court; it not being shown by them that they had given security to the satisfaction of the Probate Court, that the infant should be clothed, and educated, and reared in a becoming manner. Local Laws, 1845, p. 97.

Per Curiam.—The judgment is affirmed with costs.

A. L. Robinson, for the plaintiffs.

H. P. Biddle, for the defendant.

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PLEA OF RELEASE.—In debt on a writing obligatory, a plea of release should allege that the release was under seal.

WITNESS.—Evidence of the declarations of a witness, made out of Court, that he is interested in the suit, is inadmissible to prove him incompetent.

SAME.—To permit a party to ask a witness, whom he had previously called and examined, and whose testimony was unimpeached, whether he had any interest in the suit, is irregular, but can not be assigned for error.

SECURITY FOR COSTS.—In a suit by *A* and *B*, administrators, for the use of *C*, it was held that *A* and *B*, if non-residents, might be required to give security for costs.

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—The defendants in error, as the administrators of *John S. Duryee*, deceased, brought an action of debt against *Griggs* on a sealed note, executed in the State of *New Jersey* on the 1st day of *May*, 1817, payable one year

[*562] *after date. The declaration showed the suit to be for the benefit of *C. E. Sturgis*. Before the defendant

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pleaded, he moved for a rule on the plaintiffs to show cause why they should not give security for costs, founded on an affidavit stating that they were not residents of the State of *Indiana*. The Court overruled the motion, and the defendant excepted.

The defendant then pleaded six pleas: 1, That the plaintiffs never were administrators; 2, That the letters of administration, or a copy of them legally authenticated, had not been filed in the clerk's office of the *Allen* Circuit Court; 3, A release by the plaintiffs to the defendant; 4 and 5, Payment; 6, That before the commencement of the suit, the plaintiffs had "settled" said estate, and had been fully discharged from the further administration thereof, by the surrogate of *Somerset* county, *New Jersey*, according to law, &c. Replications to the first, second, fourth, fifth, and sixth pleas, and a special demurrer to the third plea. The demurrer was sustained. The cause of demurrer assigned was, that the release pleaded was not under seal. The issues of fact were tried by a jury. Verdict for the plaintiffs; motion for a new trial overruled; and judgment on the verdict.

The demurrer to the third plea was properly sustained. The plea did not show that the release pleaded was under seal. The debt pretended to be released was due by an instrument under seal, and it required a writing of equal dignity to release it. The weight of authority is to that effect. *Co. Litt.*, 264; *Sellers v. Bickford*, 8 Taunt., 31; *Cordwent v. Hunt*, *Id.*, 596.

On the trial, the plaintiffs produced one *Merchand* as a witness, who was sworn without objection from the defendant, and who proved that in *July*, 1841, he presented the note on which the suit was brought to the defendant for payment; that the defendant admitted that the note was due and unpaid, and that he would pay \$50.00 or \$100 on it in the fall, and the balance as soon as he was able to do so. The witness further stated that the defendant had, at several times, acknowledged to him that the note was unpaid. The defendant, who declined to cross-examine the witness, then called one *Striker* as a witness.

by whom he offered to prove that *Merchand* had admitted to him, that he (*Merchand*) had *an interest in the suit, and that all that should be collected over \$100 would be his. The plaintiffs objected to the testimony, and the Court excluded it. We are aware that there are cases in which it has been held that declarations made by a witness out of Court that he was interested in the suit might be proved to establish his incompetency. 1 Harr. & J., 105; 2 Hayw., 340; 1 Coxe, 277. On the other hand, it has been held that such declarations are inadmissible to prove the witness incompetent. It is said that the principle by which a witness is excluded on account of such declarations assumes that such unsworn statements are true, and enables an unwilling witness to deprive a party of his testimony *ad libitum*. 1 Stark. Ev., 137, note. In *Massachusetts* it has been expressly decided that such declarations are not sufficient to exclude the witness. *Commonwealth v. Waite*, 5 Mass., 261; *Pierce v. Chase*, 8 Id., 487. For the reason above given, we concur in the opinion that such declarations are inadmissible.

After the defendant had closed his testimony, the plaintiffs recalled *Merchand*, the witness by them first introduced, and inquired of him whether he had any interest in the suit. The defendant objected to the question, but the Court permitted the witness to answer, and he said that he had not. This was irregular. There had been no testimony introduced by the defendant affecting the competency or impeaching the credibility of the witness. Such testimony had been offered, but had been ruled out. We do not think, however, that it was such an error as should reverse the judgment. The witness stood in the same condition, as to his credibility and his competency, before he answered the question as he did afterwards; and the examination, irregular as it was, could have no effect on the case.

An exception is taken to the declaration on account of a misjoinder of counts. We think there is no misjoinder. Both counts are in debt.

The judgment must be reversed, however, on account of the

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refusal of the Court to require the plaintiffs to give security for costs. It was the privilege of the defendant, if he obtained a judgment in the action, to take judgment against *Sturgis*, for whose use the suit was brought, for the costs, if [*564] *he desired it. R. S., 1843, p. 735. But he was not compelled to do so. If not satisfied with *Sturgis*, he had a right to require security, as in other cases, or to have the suit dismissed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *J. G. Walpole*, for the plaintiff.

W. H. Coombs and *R. Brackenridge*, for the defendants.

FITCH v. POLKE.

ONUS PROBANDI.—Chancery. A judgment at law for a part of the purchase-money of real estate was enjoined on the ground that the vendee had been deceived by the vendor as to the title, and had remained ignorant of the defect therein until after the rendition of the judgment.

The answer to the bill alleged that the complainant knew the facts in the case pending the suit at law, and pleaded the same in bar. *Held*, that the *onus probandi* was on the defendant.

SUIT in chancery certified from the *Cass* Circuit Court.

SULLIVAN, J.—The bill in this case was filed to enjoin the collection of a judgment at law, obtained by *Polke* against *Fitch*, on a note for \$685, the balance of the purchase-money for a section of land sold and conveyed by *Polke* to the complainant. The bill alleges that, in the purchase of said land, the complainant was grossly deceived and defrauded by the defendant, who represented, at the time of the sale, and frequently before the sale, that he had a good title. It is alleged that the land belonged to *Aubenaubee*, a *Pattawatima* Indian, in his lifetime; that he died, without having conveyed said land, intestate, leaving two sons, his heirs at law, one of whom is a minor; that certain proceedings were had in the

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Wabash Probate Court, after the death of *Aubenaubee*, by which the interest of the minor heir in and to said land was directed to be sold; that a sale of the undivided half of said section was made by the guardian of the minor heir, pursuant to the order of the Court; and that, at said sale, one *John T. Douglass* became the purchaser; that said proceedings were all irregular, and the sale under them was void. It is alleged that *Polke* had no title to the land except what he [*565] *derived from *Douglass*, yet that he conveyed to the complainant the entire section, &c. The complainant states, that he was wholly ignorant of the fact that *Polke* had not a good title, until after the judgment, now sought to be enjoined, had been rendered. The deed from *Polke* to the complainant, the proceedings in the *Wabash* Probate Court above referred to, and the deed from the guardian of the minor heir of *Aubenaubee*, are made exhibits. An agreement between *Ewing, Walker, and Co.*, *A. Hamilton and Co.*, and *John T. Douglass*, is also made an exhibit, by which it appears that *Ewing, Walker, and Co.*, and *A. Hamilton and Co.*, relinquished to *Douglass* all claim to the section of land sold by *Polke* to the complainant; but what title or claim they had to the land is not shown. The bill further alleges that *Polke* is insolvent, and has removed beyond the jurisdiction of this State.

The answer of the defendant admits the sale and conveyance of the entire section of land as stated in the bill. It admits that a large portion of the purchase-money was paid by the complainant at the time of the sale, and that the judgment at law, mentioned in the bill, is for the residue. It admits that the defendant had no other title to the land than that derived from the heirs of *Aubenaubee* through *Douglass*, and insists that it was a good and complete title. It alleges that the complainant was, at the time of the purchase, fully acquainted with the defendant's title; denies that any false representations as to the title were made; and says that, pending the trial, the complainant filed pleas in bar of the note on which the judgment at law was obtained, and afterwards abandoned the defense. The defendant admits that he does not reside within

the jurisdiction of this State, but denies the charge of insolvency.

No depositions are on file; and the cause is submitted to us on bill, answer, and exhibits.

There are certain facts in this case about which there is no controversy between the parties. It is agreed, that the defendant sold to the complainant the entire section of land mentioned in the bill, for the price of \$1,700, and that all of the purchase-money was paid except the sum of \$685. It [*566] is also agreed, that the land mentioned is one of *the ten sections of land granted to *Aubenaubee* by the treaty entered into between the *United States* and the *Pattawattimas* of the State of *Indiana* and *Michigan* territory, on the 27th day of *October*, 1832. The parties also agree, that *Aubenaubee* died intestate, leaving two sons who inherited the land mentioned, and that one of them is a minor. With those facts admitted, the exhibits show that *Polke* had title only to the half of the land. The title to the remaining half is in the oldest son of *Aubenaubee*. It is therefore not necessary, according to this view of the case, to decide whether the sale of the minor heir's interest, made under the decree of the *Wabash* Probate Court, be valid or not. Admitting that it is valid, and that the proceedings must stand until they are reversed, it is manifest that *Polke* sold to the complainant land for which he had no title.

We are satisfied, therefore, that this is a proper case for the interference of a Court of equity. It appears that the complainant was deceived by the false representations of the vendor as to his title, and that he remained ignorant of the fact that the vendor had not a good title, until after the rendition of the judgment at law. This excuse for not defending at law is sufficient to authorize the interference of a Court of equity. *Williams v. Lee*, 3 Atk., 223; *Simpson v. Hart*, 1 J. C. R., 98; *Shelmire v. Thompson*, 2 Blackf., 270. The defendant, it is true, alleges that the complainant knew all the facts of the case as well pending the suit at law as he did when he filed his bill, and that he pleaded the same matter in bar of the action at

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law; but no proof of the allegation, although the proof was within his reach if the allegation be true, has been adduced. *Bowser v. Bliss*, May, term, 1845.

The Court rendered a decree enjoining the judgment, and for costs.

C. Fletcher, O. Butler, S. Yandes, and W. Wright, for the complainant.

J. B. Niles and H. Cooper, for the defendant.

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*BREWER v. MURRAY.

APPEAL FROM JUSTICE.—An appeal lies to the Circuit Court from the final judgment of a justice of the peace, however informal the judgment may be.

WITNESS.—If *A*, the surety in a replevin bond, be a material witness for the plaintiff in the action of replevin, the Court should permit another surety to be substituted by the plaintiff in *A*'s place.

APPEAL from the *Porter* Circuit Court.

DEWEY, J.—*Brewer* commenced an action of replevin against *Murray*, before a justice of the peace. The affidavit, filed by the plaintiff, stated his claim to a pair of oxen (describing them by their colour), and to a yoke, ring, and staple. The writ was issued accordingly. The justice rendered a judgment as follows: "It is considered that the plaintiff take nothing by his suit; but that he return the goods and chattels described in the affidavit to the defendant, according to law; and that the defendant recover of the plaintiff his costs of suit." The plaintiff appealed. The Circuit Court, on the motion of the defendant, dismissed the appeal, on the ground "that there was no such judgment rendered by the justice as authorized an appeal."

We see no ground on which this decision can be sustained. The statute authorizes appeals generally from the judgments of justices of the peace. The judgment in the record is not so formal as it might have been, but it is a judgment, and a final one against the plaintiff. Had it contained nothing but that the plaintiff should take nothing by his suit, and that the defendant should recover costs, an appeal would have lain from

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it. It is of very little importance what may be the form of a justice's judgment, so far as the appeal is concerned. The trial in the Circuit Court is *de novo*; and that Court renders its own judgment according to the merits of the cause.

A bill of exceptions shows that the replevin-bond, taken by the constable, was filed in the Circuit Court among the papers of this cause; that the surety of the plaintiff in that bond (*J. B. Brewer*) was a material witness for him; that before the motion to dismiss was made, the plaintiff moved the Court for leave to substitute another surety in the place of *J. B.*

Brewer; that he offered one *Storer* for that purpose, [*568] he *being in Court and assenting to the change, and being admitted by the defendant to be competent as a surety. The defendant objected to the substitution, and the Court overruled the motion.

The question here raised does not strictly belong to this cause in its present shape; but as it will probably present itself in the future progress of the action, it may as well be settled now. We think the motion should have been granted. It is customary with Courts to restore the competency of a witness, who has become interested in consequence of being a surety for a party in an instrument growing out of a cause, by substituting another surety in his place. A defendant has been allowed to change his bail, for the purpose of using the first bail as a witness. *Anon.* 2 Chitt. R., 103. So, upon a defendant's depositing money enough to cover the debt and costs, the name of his bail has been stricken out of the bail-piece, and the person thus exonerated rendered competent as a witness for him. *Bailey v. Hole*, 3 C. & P., 560. And in *Bailey v. Bailey*, 1 Bingh., 92, which was an action of replevin, one of the sureties in the replevin-bond being a material witness for the plaintiff, another person was substituted as surety, by order of the Court. In none of these cases was the consent of the opposite party to the change asked or given.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles and *A. L. Osborn*, for the appellant.

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HART and Others v. WOODS.

AUCTION SALE—STATUTE OF FRAUDS.—At a public sale of town-lots, a lot was struck off to a person for a certain sum, and a memorandum of the purchase was made at the time, by the clerk of the sale, in the sale-book. *Held*, that the sale was valid under the statute of frauds.

VENDOR AND PURCHASER—SET-OFF.—The vendor of the lot so sold afterwards tendered a good conveyance in fee for the lot to the vendee, if he would pay the purchase-money, or allow the same on a note held by him on the vendor. The tender was refused. *Held*, in a suit on the note by the assignee of the vendee, (the assignment having been made after the tender), that said purchase-money was a legal matter of set-off.

[*569] *APPEAL from the *Henry* Circuit Court.

BLACKFORD, J. — This was an action of debt brought by *Woods* as assignee of one *Lewis*, on a sealed note executed by the defendants, *Hart* and others, for the payment of money. The cause was submitted to the Court on the following agreed case:

The note on which this suit is brought, was given in part payment of the purchase-money of certain real estate in *Henry* county, bought by *Hart* and *Tate*, two of the defendants, of *John Lewis*, the plaintiff's assignor. The purchase was made, and a title-bond executed, on the 1st of *December*, 1838. By the agreement of the parties, possession of the estate was not given till the 1st of *October*, 1839. The State and county tax on the real estate for 1839 was \$17.00, which, to prevent its collection by law, was paid in 1840 by the defendants, prior to the assignment of the note. In *March*, 1839, the defendants laid off a portion of said estate into town lots, and, during said year, the lots were sold at public vendue, and, at the sale, lot No. 5, in block No. 1, was struck off to *Lewis* for the sum of \$78.00, a memorandum of which purchase was made at the time, by the clerk of the sale, in writing in the sale book. At the time of such purchase, the legal title to the whole of said real estate was still in *Lewis*, who subsequently conveyed the whole of it to *Hart* and *Tate* agreeably to the requisitions of the title-bond. The other defendants are partners in the pur-

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chase. Subsequently to the sale, and prior to the assignment of the note, a good warranty deed in fee-simple for the lot was duly executed and tendered to *Lewis*, if he would pay said purchase-money or allow the same on said note. He refused thus to receive the deed, saying that the residue of said note had not been paid when due. The defendants are still willing and ready to deliver said deed on the condition aforesaid. It is agreed, that if said two sums are valid set-offs to said note, the judgment shall be for the plaintiff for \$194.45; but if those sums ought not to be set off, then the judgment for the plaintiff shall be for \$318.45.

The Court gave judgment for the plaintiff for \$295.76.

In fixing the amount of the judgment, the Court [*570] allowed *the defendants the sum paid by them for taxes with interest, but rejected their claim for the purchase-money of the lot.

The only question here is, were the defendants entitled, as a set-off, to the \$78.00, the price of the lot bought by *Lewis*?

The sale of the lot, we think, was valid under the statute of frauds. The clerk of the sale, in making the memorandum of purchase, acted as the agent of the buyer as well as of the seller. It was necessary for the defendants in this case, before they could demand payment of the lot, to tender a conveyance for the same on being paid the price. This tender was made; and when the vendee refused to accept the conveyance, and pay the purchase-money or allow the amount on the note, he became liable to a suit for the purchase-money. That being the case, the price of the lot must, as a debt due from the vendee to the defendants, be a legal matter of set-off in this suit.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker, for the appellants.

R. M. Cooper, for the appellee.

CLARK and Others v. THE STATE, on the Relation of THE STATE BANK.

SHERIFF'S BOND.—In debt on a sheriff's bond, the defendants are not entitled to *oyer* of the approval of the bond by the judges; such approval being no part of the bond.

SAME—DAMAGES.—On the execution of a writ of inquiry in such suit, after a demurrer to the replication assigning breaches has been overruled, the *quantum* of the relator's damages caused by the breaches, is the only subject of inquiry.

APPEAL from the *Hendricks* Circuit Court.

SULLIVAN, J.—Debt by the appellee against the appellants on the official bond of *Clark*, late sheriff of *Hendricks* county. The suit was brought, under the statute of 1838, on the penalty of the bond. The defendants in the Circuit Court craved *oyer* of the bond and condition, which was granted. They also craved *oyer* of the attestation of the bond and its approval by the associate judges of the county. The [*571] *plaintiff replied that there were no subscribing witnesses to the bond, and, to the demand of *oyer* of the approval of the bond by the judges, demurred. The Court sustained the demurer; and that is the first error complained of.

The Court did not err in sustaining the demurrer. The defendants were entitled to *oyer* of the bond and condition, and, if the bond had been attested, of the attestation also; but the approval by the judges is no part of the bond. That was a collateral matter wholly independent of the execution of the bond, and equally accessible to the defendants as to the plaintiff.

The defendants then pleaded performance generally. The plaintiff replied assigning as breaches, 1, That *Clark*, on &c., failed and neglected to return a certain writ of *venditioni exponas*, issued out of the clerk's office of *Hendricks* county in favour of the relator against *Stiles* and *Boswell*, and directed and delivered to him, whereby he was commanded, &c.; 2, That *Clark* failed to pay over a large sum of money, to wit, the sum of \$500, collected by virtue of said execution; and 3,

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That said *Clark* willfully, corruptly, and fraudulently, failed to make sale of certain property seized by virtue of said execution and sufficient to satisfy the same, which would have been purchased had he offered the same, bidders being then and there present, &c. Demurrer to the replication, assigning special causes of demurrer to each breach; and judgment on the demurrer for the plaintiff. Writ of inquiry awarded; damages assessed by a jury; and judgment accordingly.

We perceive no error in overruling the demurrer to the replication. The appellants contend that there were three replications to the plea, and a demurrer to each, and that the Court gave judgment on one of the issues only, and left the other two undecided. There is some confusion in the record, but we understand the pleadings to be as we have above stated them, and think the demurrer was correctly overruled.

At the execution of the writ of inquiry, the defendants offered no testimony; and the plaintiff having closed, the Court instructed the jury "that the demurrer to the breaches in the replication admitted the truth of the facts stated in them, and that all the jury had to do when they retired, was to assess such damages as the plaintiff was entitled to [*572] recover, *from the proof made of the actual damage the relator had sustained, by said *Clark's* failing to make sale of the property levied on." To that instruction the defendants excepted. The instruction was correct. The demurrer of the defendants admitted the facts, and that which is admitted on the record need not be proved. This did not prevent the defendants from appearing and contesting the amount of damage sustained by the relator. They might have introduced testimony in mitigation, and the jury would have been required to assess the damages accordingly. *Chinn et al. v. Perry*, 2 Blackf., 268.

We are of opinion that there is no error in the case.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs.

C. C. Nave, for the appellants.

C. Fletcher, O. Butler, and S. Yandes, for the appellee.

DENNIS v. DENNIS, on Appeal.

IN a suit in chancery for dower, it must appear that the complainant's husband was seised of the premises at some time during the coverture, or she can not recover.

WALLS v. THE STATE.

CONCEALED WEAPONS.—If a person, not being a traveler, carry a pistol concealed about his person, he is guilty of an indictable offense. His motive for carrying the pistol is immaterial.

ERROR to the *Union* Circuit Court.

DEWEY, J.—Indictment for carrying concealed weapons. One count charges the defendant below with carrying a dirk concealed about his person; and another alleges that he carried a pistol concealed in his pocket. Plea, not guilty; verdict, guilty and a fine of \$20; judgment accordingly.

On the trial, evidence was given tending to prove that the defendant, not being a traveler, carried a six barrel pistol about his person, which he frequently exhibited as “a kind of curiosity.” The defendant prayed the Court to [*573] instruct the *jury that if they believed, from the evidence, the defendant carried the pistol merely for the purpose of exhibiting it as a curiosity, they should find him not guilty. The Court refused so to instruct.

There was no error in that refusal. First, because, for aught that appears of record, there might have been evidence enough to convict the defendant on the first count of the indictment for carrying a concealed dirk. And, secondly, because, if the defendant, not being a traveler, carried a pistol concealed, he was guilty of the offense prohibited by the statute. R. S., 1843, p. 982. His motive for or intention in carrying it constituted no part of the offense, and, of course, had nothing

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to do with his guilt or innocence of the fact charged—that of carrying the pistol concealed. If he exhibited his pistol so frequently that it could not be said to be concealed, that was another matter; but it was a fact exclusively for the jury and was not embraced by the instruction asked for.

Per Curiam.—The judgment is affirmed with costs.

J. B. Sleeth and *J. Ryman*, for the plaintiff.

A. A. Hammond and *S. Major*, for the State.

ABBOTT v. WARRINER.

FOREIGN ATTACHMENT, BAIL.—The defendant in foreign attachment may plead in abatement without filing special bail.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—A writ of foreign attachment was issued in October, 1841, in favour of *Warriner* against the lands, &c., of *Abbott*. Publication was duly made and proved, and the cause continued until the fall term of the Court, in November, 1842. The defendant, at said term in 1842, without giving special bail, moved the Court for leave to file a plea in abatement. The substance of the plea was that at and before the filing of the affidavit, and the issuing of the attachment, and ever since, the defendant was a resident of the State of *Indiana*. The plea was sworn to. The motion for leave to file this plea was refused. Special bail was then put [*574] *in by the defendant. There were pleas in bar filed on which issues were joined. The cause was tried, and judgment rendered for the plaintiff.

We think the Court erred in refusing the defendant leave to file the plea in abatement. It was necessary for the defendant to put in special bail, in order to have his property released pending the suit, or to enable him to plead in bar. R. S., 1838, p. 80. But there can be no reason why a motion to quash the writ should not be made, or a plea in abatement

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filed, without the giving of special bail; and the statute does not require it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

I. H. Kiersted, for the plaintiff.

SHIEL v. FERRITER.

SCIRE FACIAS—EXECUTION.—A suggestion in a *scire facias* for execution against real estate on a justice's transcript, that it was made known to the justice that the defendant had lands in the county subject to execution, is sufficient after trial and judgment for the plaintiff.

SAME—EVIDENCE OF OWNERSHIP.—Proof in such case that the defendant was living on forty acres of land in the county, claiming the same as his own, is *prima facie* evidence that he was the owner of the land.

PRACTICE.—A trial in such suit without an issue is erroneous.

SAME.—That the justice's transcript was filed in the clerk's office, and recorded, is a material averment in such *scire facias*, and, if denied, must be proved.

ERROR to the *Hamilton* Circuit Court.

DEWEY, J.—*Scire facias* on the transcript of a justice's judgment and proceedings for execution against real estate. The writ alleges the rendition of the judgment by the justice; the issuing of an execution thereon, and the return of the same "no goods found;" the filing in the clerk's office, and the recording of a certified transcript of the justice's judgment and proceedings. It also contains this suggestion, namely: "Whereas, also, it has been made known to the justice that said *Patrick Shiel* (the defendant) has lands and tenements subject to execution in *Hamilton* county." The

parties appeared and went to trial before the Court [*575] without any answer whatever to the *scire facias* appearing of record. The plaintiff produced a certified transcript of the judgment and proceedings of the justice as it is alleged in the *scire facias* (but it did not appear that the transcript had been filed in the clerk's office or recorded.) He also proved that the defendant was, at the

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time of the trial, and had been for five years before, living on forty acres of land in *Hamilton* county, claiming it as his own. The Court gave a judgment of execution in favour of the plaintiff.

It is contended by the plaintiff in error, that the *scire facias* is defective for not containing a sufficient suggestion, that the defendant had land subject to execution at the time of the issuing of the writ; and, also, that the proof of his ownership of land was not sufficient.

The statute now in force is, that a *scire facias* upon a justice's transcript to bind real estate, shall contain a suggestion that the judgment-debtor has lands or tenements within the proper county, liable to execution; and that such suggestion shall be supported by satisfactory proof, or, on failure thereof, judgment of nonsuit shall be entered. R. S., 1843, p. 888. Had there been a demurrer to the *scire facias*, perhaps the allegation respecting the defendant's ownership of land would not have been sufficient; but after trial and judgment, we think the objection to the form of the suggestion comes too late.

As to the proof of the defendant's ownership of land, evidence that he was in open possession of real estate, was *prima facie* enough to show that he was the owner.

The judgment must, however, be reversed. There was a trial without an issue, which was erroneous. But had all the material allegations of the *scire facias* been at issue, the result must have been the same. The writ properly contains an averment that the justice's transcript was filed in the clerk's office and recorded. Of this averment there was no proof. The evidence, therefore, was not sufficient to authorize the judgment of execution.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and L. Barbour, for the plaintiff.

Dumont v. Lockwood.

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*DUMONT v. LOCKWOOD.

TROVER—PRACTICE.—An objection to a declaration in trover because the venue is wrong, can be made only on special demurrer.

ERROR to the *Clinton* Circuit Court.

DEWEY, J.—*Dumont* commenced an action of trover against *Lockwood* in the *Clinton* Circuit Court, laying the venue in *Cass* county. The defendant pleaded not guilty, upon which there was issue. The cause was continued several times, when, on the motion of the defendant, the Court dismissed the action on the ground of a supposed want of jurisdiction.

We think the Court was mistaken in supposing they had no jurisdiction of the cause. The statute of jeofails, which was in force when the action was commenced, adopts the act of 16 and 17 Car., 2, c. 8. R. S., 1838, p. 456. The *English* statute enacts, that no judgment shall be reversed or arrested "for that there is no right venue, so as the cause was tried by a jury of the proper county or place where the action is laid;" and one clause of our present statute of jeofails, which was in force when the cause was dismissed, contains a similar provision. R. S., 1843, pp. 714, 715. It has been held, that the statute of Car., 2, cured a wrong venue, if there had been a verdict in the county where the action was laid or brought. *Craft v. Boile*, 1 Saund., 246, 248, n. 3. And even in a local action brought and tried in a wrong county, the defect, if it appear of record, is aided by the same statute. A demurrer, however, will reach it. *Id.*, 241, c., n. 6; *Mayor of London v. Cole*, 7 T. R., 583. So, also, a local action may, by the consent of the parties appearing of record, be tried in another county. 1 Chitt. Pl., 268. And in transitory actions like this, a wrong venue in a declaration is mere matter of form, and can be reached only by a special demurrer. *Briggs v. The Nantucket Bank*, 5 Mass. R., 91; *Gilbert v. The Nantucket Bank*, *Id.*, 97. These authorities suffice to show that the Circuit Court of *Clinton* county had jurisdiction of this cause, and that its dismissal was erroneous.

Givens v. Burget.

[*577] **Per Curiam*.—The judgment is reversed with costs.
 Cause remanded, &c.
H. P. Biddle, for the plaintiff.
D. Mace and *W. Wright*, for the defendant.

THE STATE, on the Relation of ROBINSON, v. BURNSIDE and
 Others, in Error.

AN execution issued by a justice of the peace, reciting a judgment rendered by him for \$102, with interest and costs, was held to be valid. *The State, ex rel. Likens, v. Westbrook et al.*, May term, 1844.

GIVENS v. BURGET.

VOID CONTRACT.—The promise of a purchaser of *United States'* land to pay a person for an improvement, which the latter had made on the land before the purchase, is valid under the statute of 1834.(a)

ERROR to the Jasper Circuit Court.

BLACKFORD, J.—This was an action of assumpsit in which *Burget* was the plaintiff. Plea, the general issue. The cause was submitted to the Court, and judgment rendered for the plaintiff.

The facts in this case necessary to be noticed are as follows: The plaintiff, in 1839 or 1840, made an improvement on a quarter section of land owned by the *United States*. The improvement consisted in plowing a few acres of the land in a prairie, and inclosing with a fence the land so plowed. In 1841, the defendant bought said quarter section of land of the *United States*, and took possession of it. In 1843, the plain-

(a) *Burns v. Kerr*, 4 Ind., 267.

Van Vacter v. McKillip.

tiff; defendant, and one *Pomeroy*, being together, the latter offered to let the defendant have certain rails (about four hundred), if he would pay the plaintiff for said improvement. The defendant then agreed to pay for the improvement, and afterwards made use of the rails.

The promise, as appears by the briefs of the counsel [*578] of the *parties, was made to *Burget*, but the consideration, except the improvement, moved from *Pomeroy*.

Assuming the consideration which moved from *Pomeroy*, to be insufficient to support the promise, the plaintiff would fail as the law was when the case of *Boston v. Dodge*, 1 Blackf., 19, was decided. But after that case a statute passed, and which was in force when the defendant's promise was made, which enacts, "That no contract made in consideration, either in whole or in part, of the sale of any interest, real or supposed, in or to any land belonging to the *United States*, or for the occupancy thereof, or any improvement made thereon, shall, for that cause, be avoided or impeached," &c. Stat., 1834, p. 60. There can be no doubt but that under this statute, the plaintiff has a right to recover, though it be considered that there was no consideration for the promise but the improvement on the land made by the plaintiff.

Per Curiam.—The judgment is affirmed with costs.

D. D. Pratt, for the plaintiff.

A. L. Robinson and *H. P. Biddle*, for the defendant.

VAN VACTER v. MCKILLIP.

CHALLENGE OF JUROR.—A petit juror being challenged stated on oath, that he did not know but that he had formed an opinion in the case from rumour; but that he thought his opinion would readily yield to the evidence, if it should differ from the rumour he had heard. *Held*, that the challenge was not sustained.

CRIMINAL CONVERSATION.—Case lies for criminal conversation with the plaintiff's wife.

Van Vacter v. McKillip.

WITNESS.—Whether the testimony of a witness is rendered suspicious by any of the facts proved, is a question not for the Court, but for the jury.

[*579] **CRIM. CON., EVIDENCE IN MITIGATION.**—*In a suit for crim. con., evidence that the plaintiff is ill-tempered, and that previously to the illicit intercourse charged, he and his wife lived unhappily, and occasionally came to blows, is inadmissible in mitigation of damages.

PRACTICE.—The admission of immaterial evidence (the merits of the cause having been fully tried) can not be assigned for error.

APPEAL from the *Union Circuit Court*.

SULLIVAN, J.—Case by *McKillip* against *Van Vacter* for enticing away and debauching the plaintiff's wife. There were two counts in the declaration; the first was for criminal conversation; the second was for enticing away, &c. The defendant pleaded, first, not guilty; and to the second count, he pleaded that the plaintiff's wife left his house by and with his leave and consent, and not by or with the advice or procurement of the defendant. Replication in denial of the second plea, and issue. Verdict and judgment for the plaintiff.

During the impanneling of the jury, one *Josiah Bennett* who was called to serve as a juror, was challenged by the plaintiff, and was required to answer questions on oath touching his competency to serve as juror. Being interrogated as to his having formed an opinion in the case, he answered "that he did not know but that he had formed an opinion in the case from rumour," whereupon the plaintiff waived his challenge. The defendant then objected to *Bennett*, and *Bennett* being further interrogated said, "that he thought his opinion would readily yield to the evidence, if it should differ from the rumour he had heard." The Court overruled the objection to the juror, and he was thereupon sworn to try the cause. The defendant excepted. The defendant's objections to the judgment of the Circuit Court on this point, are fully answered by the opinion of this Court in the case of *McGregg v. The State*, 4 Blackf., 101. We adhere to the decision there made, that an opinion, founded merely on report, where there is no proof of ill-will to either of the parties; or where the opinion is not so firmly settled as to justify a belief that the juror would not do justice in the case; is not sufficient to disqualify him from serving.

The next error assigned is, that the Court refused to give the following instruction to the jury, viz.: If the defendant entered upon the premises of the plaintiff and de- [*580] bauched the *plaintiff's wife, the jury should find for the defendant on the ground that the action should have been trespass and not case. The instruction was correctly refused. Though it is usual to declare in trespass *vi et armis* for criminal conversation, &c.; yet, as the consequent loss of society is the ground of action, the plaintiff is still at liberty to declare in case. 1 Chitt. Pl., 134.

After the testimony was closed, the Court, on motion of the plaintiff, instructed the jury substantially, that the plaintiff, to support his action, must prove a marriage in fact; that he must prove the adulterous intercourse, or that the defendant enticed away the plaintiff's wife, either of which would support the action; that circumstantial evidence would be sufficient, and that the jury were to judge of the circumstances, and of the credibility of the witnesses; that the defendant might defeat the charge of criminal conversation, by showing that the connection had taken place with the privity or consent of the plaintiff; and that he might defeat the second count by showing that the plaintiff's wife left his house by his leave; and that the defendant might prove in mitigation of damages the loose character of the plaintiff's wife, &c. The defendant thereupon moved the Court to give certain instructions to the jury which were refused, and which refusal constitutes the third error assigned. We are of opinion that the Court committed no error, in refusing the instructions asked, for which the judgment should be reversed. We do not feel called upon to examine, in this opinion, the instructions *seriatim*, especially as the plaintiff in error insists only upon two of them,—the fourth and the eleventh.

The fourth instruction asked and refused was as follows, viz.: If the jury believe that the supposed discovery of the wife's adultery was made by the children of the plaintiff, and was not communicated to him until a quarrel took place between the plaintiff's wife and his children, it is a circum-

stance to throw suspicion on their testimony. The Court, very correctly, refused the instruction as asked. They had no right to instruct the jury, that the circumstance referred to *would* throw suspicion on the testimony of the witnesses. That was for the jury to consider. It might be explained so as to have no weight whatever. The Court, moreover, had already
*581] *informed the jury that, of the circumstances and of the facts stated by the witnesses, and of the credit to be given to their testimony, they were the judges. The quarrel between the witnesses and the plaintiff's wife, and the delay to communicate to the plaintiff the discoveries made, until after the quarrel, were circumstances in the case embraced by the instruction given.

The eleventh instruction asked was in the following words, viz.: "If the jury believe that the plaintiff is an ill-tempered man, and that previously to any illicit intercourse between the plaintiff's wife and the defendant, the plaintiff and his wife lived together unhappily, and occasionally came to blows, these are circumstances which the jury may consider in mitigation of damages." There are many facts and circumstances which the defendant, in an action of this kind, may show in mitigation of damages; but we have met with no case in which it has been decided that a bad temper, or the occasional collisions that may take place between husband and wife, in consequence of the bad temper of either or both of them, afforded the slightest extenuation to the guilt of a seducer. The ebullitions of passion soon pass away, and domestic peace and comfort, though interrupted temporarily, are not destroyed. They inflict no wound on the husband's honour. Why, then, should those momentary outbreaks of feeling mitigate the damages for an injury that forever destroys his domestic enjoyment, and inflicts a wound upon his honour that can not be healed? What excuse can the seducer find in such unhappy discords for his guilt? If, by artfully taking advantage of them, he draws the wife off from her allegiance to her husband, and weans her affection from him entirely, does it not rather aggravate than extenuate the injury? The Court did not err in refusing the instruction.

The State v. Wilder, in Error.

There is one other point in the case to which the plaintiff in error has called our attention. On the trial of the cause, the plaintiff below was allowed to prove, without objection, that the defendant had fled to avoid the service of process in this case. It appeared to the Court, however, as a bill of exceptions informs us, that the process was served in the county of *Union*, whereupon the plaintiff offered in evidence a writ issued in the case directed to the sheriff of *Marshall* [*582] *county, and a return, indorsed thereon, that he had served it on the defendant. To the introduction of the writ and return, the defendant objected. We think the whole of the testimony relative to the absence of the defendant was immaterial. It had no bearing whatever on the merits, and we must presume had no effect, one way or another, upon the minds of the jury. The case having been fully tried upon the merits, we can not, according to previous decisions of this Court, disturb the judgment because testimony upon an immaterial point was not excluded.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs.

J. S. Reid, S. W. Parker, and C. H. Test, for the appellant.

J. Yaryan, J. S. Newman, and J. Rariden, for the appellee.

THE STATE v. WILDER, in Error.

INDICTMENT against a justice of the peace for failing to return to the clerk's office, &c., a certificate of the solemnization of a marriage, &c. *Held*, that an averment as to a license having issued was unnecessary, and should be rejected as surplusage. *The State v. McWhinney*, 5 Blackf., 364.

WOODRUFF v. DOBBINS and Others.

DELIVERY-BOND.—In debt on a delivery-bond, a plea relying on the parol agreement of the plaintiff, dispensing with the defendant's performance of the condition of the bond, is bad.

ACCORD.—An accord can not, in any case, be pleaded in bar, unless it be executed.

ERROR to the *Hancock* Circuit Court.

BLACKFORD, J.—This was an action of debt on a delivery-bond, the condition of which was, that *Dobbins* should deliver, at eleven o'clock on a certain day, and at a certain place, a certain horse, which had been levied on, &c. There [*583] *are three pleas in bar, but it is only necessary to notice the third. That plea states, that *Dobbins* was prevented by the plaintiff from delivering the horse at the time and place appointed, in this, viz., that at eight o'clock on the day fixed for the delivery, the plaintiff fraudulently represented to *Dobbins*, that there was no necessity for delivering the horse at the time and place appointed, and that he would take other property than the horse at two-thirds of its fair value in discharge of the judgment and costs; that *Dobbins* assented thereto, and tendered to the plaintiff such other property, which the plaintiff, from eight o'clock till three o'clock of said day, agreed to accept, but at three o'clock he refused to receive the same; and that at three o'clock of said day, *Dobbins* had the horse at the place ready to deliver, but that the sheriff was not there, &c. General demurrer to this plea, and judgment for the defendants.

The plea demurred to is insufficient. It is not a plea of accord and satisfaction, as the property agreed to be taken in discharge of the judgment and costs was not received by the plaintiff. An accord can not, in any case, be pleaded in bar unless it be executed. Bac. Abr. tit. Accord and Satisfaction. *Allen v. Harris*, 1 Ld. Raym., 122. Whether if the plea had alleged the property to have been received, it would have been good, is a question not belonging to the case.

Newhouse and Another v. Hill.

The plea merely sets up a parol agreement made by the plaintiff, dispensing with the defendants' performance of an agreement under seal. The law is settled that this can not be done, because matters which are contracted for by deed can not be dissolved except by deed. *Thomspon v. Brown*, 7 Taunt., 656; *Cordwent v. Hunt*, 8 Taunt., 596. The latter case was as follows: The plaintiff, lessee of a farm, covenanted with the defendant, his lessor, to fetch and bring all such materials as should at any time during the continuance of the term be wanted in erecting a threshing mill; which mill the defendant covenanted with the plaintiff to erect during the continuance of the term, for the use of the lessee and the occupiers of an adjoining farm. The defendant pleaded, first, that within a reasonable time from the date of the indenture, and during the continuance of the term, he began to provide the necessary materials for erecting the *mill, and whilst he was so doing, the plaintiff desired him not to erect the same, but to refrain from so doing until he should be requested by the plaintiff; and, lastly, a plea of leave and license during the term. These pleas were held to be bad on special demurrer. This case, which is founded on *Thompson v. Brown*, above cited, is decisive of the one before us.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and L. Barbour, for the plaintiff.

NEWHOUSE and Another v. HILL.

TITLE-BOND—EJECTMENT—INJUNCTION.—*Held*, that a bill in chancery filed by the obligee of a title-bond in possession of the premises, to enjoin an action of ejectment brought on the demise of the obligor's grantee, should allege that possession of the premises had been demanded of the complainant before the action of ejectment was brought. *Held*, also (as the complainant was to have the title when he paid the purchase-money), that the bill should aver that the purchase-money had been paid.

SAME—MORTGAGE.—The obligee of such bond mortgaged it to A, and the

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latter afterwards obtained the legal title to the premises from the obligor and gave up the bond to him. *Held*, that a bill filed by the mortgagor against the mortgagee and obligor to set aside that transaction between the defendants could not be sustained; the transaction not being of any injury to the complainant.

SAME.—A prayer in such bill, that the mortgagee be decreed to file a bill of foreclosure against the complainant, is mere surplusage.

[*585] *ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—*Hill* filed a bill in chancery against *Newhouse* and *Robinson*, in 1842.

The bill states that *Hill* was the owner of two certificates for tracts of canal land, and of a title-bond for twenty acres of land, part of another tract of canal land; that the title-bond was executed by *Robinson* to *Hill*, and contained a condition that if *Hill* should pay *Robinson* \$90.00, as therein mentioned, and should also, whenever *Robinson* should pay the State the amount due on the tract of land of which the twenty acres were a part, pay him \$22.50, with interest, *Robinson* would, on receiving a patent, make *Hill* a deed for the twenty acres of land; that *Hill* had paid the \$90.00, and was ready to pay the \$22.50, with interest, whenever requested; that *Hill* mortgaged his said two canal certificates and the title-bond to *Newhouse*, to secure the payment of a certain debt, &c.; that *Newhouse* afterwards prevailed on *Robinson* to pay, or paid himself, the amount due the State on the tract of land of which the twenty acres were a part, and fraudulently procured from *Robinson*, who had notice of all the circumstances, a deed for the twenty acres of land without *Hill's* knowledge; that *Newhouse*, on getting the legal title from *Robinson*, as aforesaid, gave up to him the title-bond; and that *Newhouse* has brought an action of ejectment to put *Hill* out of possession. The prayer is that the transaction mentioned in the bill, between *Newhouse* and *Robinson*, be set aside; that *Newhouse* file a bill of foreclosure against *Hill*; and that the action of ejectment be enjoined.

Demurrer to the bill; demurrer overruled; and a decree rendered for the complainant, as prayed for by the bill.

The Court erred in overruling the demurrer. The bill does

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not make out a case to authorize the action of ejectment to be enjoined, first, because, by omitting to allege that the possession of the premises had been demanded of the complainant before the action was brought, it does not appear but that he has a defense at law to that action; and, secondly, because it omits to allege a payment or tender of the \$22.50, with interest, which were due as a part of the purchase-money for the twenty acres of land.

[*586] *Again, the statement in the bill as to the conveyance of the legal title by *Robinson* to *Newhouse* of the twenty acres of land, and the giving up, by the latter to the former, of the title-bond for the same, does not show a transaction by which *Hill* could be injured, or of which he ought to complain. He has the same right to file a bill against *Newhouse* to redeem that he had before, after having paid or tendered the mortgage-debt, &c.; and, besides, upon the payment or tender, he may now obtain from *Newhouse* a legal title to the twenty acres of land.

The prayer of the bill that *Newhouse* be decreed to file a bill to foreclose is mere surplusage. *Newhouse* must be at liberty to file such bill or not as he may think proper.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

D. Wallace, for the plaintiffs.

R. Brackenridge, for the defendant.

 KINDLE and Others v. THE STATE, on the Relation, &c.

COUNTY TREASURER'S BOND.—Debt on a county treasurer's bond. Breaches assigned in the declaration: 1, That the treasurer did not make settlement with the county auditor, &c.; 2, That he did not pay over the State revenue, &c. Pleas: 1, Not guilty; 2, Performance, in general terms. *Held*, that the pleas were bad.

SAME—CHANGE OF LAW.—If after a county treasurer has given bond, with sureties, for the discharge of his duties, the law respecting county treasurers be changed, by extending the time for their making settlements and

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payments, &c., and the said treasurer fail to discharge his duties under the new law, he and his sureties will be liable on their bond.

ERROR to the *Madison* Circuit Court.

SULLIVAN, J.—Debt on a county treasurer's bond. The declaration sets out that to the bond sued on there was a condition annexed, whereby, after reciting that *James A. Kindle* had been elected to the office of treasurer of *Madison* county, it was stipulated that if the said *Kindle* should and would pay over, according to law, all moneys that might come into his hands for State, county, road, or other purposes, during his continuance in office, then said bond should be void—otherwise, to remain in full force, &c. The [*587] first breach *assigned is, that although a duplicate was, on, &c., made out by the auditor of *Madison* county, and delivered to said *Kindle*, and although *Kindle*, as treasurer of said county, did then and there take upon himself the collection of the taxes assessed in said county for the year 1843 according to said duplicate, &c.; yet *Kindle*, as treasurer of said county, did not on the second *Monday* of *January*, 1844, he still being treasurer, make settlement with the auditor of said county, and make return of delinquencies, &c., according to law, but wholly neglected so to do. The second breach is, that *Kindle*, as such treasurer, collected the sum of \$4,000, as part of the taxes for the year 1843, for State purposes; yet he did not on the fourth *Monday* of *January*, 1844, nor at any other time, pay the same or any part thereof to the Treasurer of State, as by law he was required to do, &c. *Kindle* filed two pleas: 1st, Not guilty of the several breaches assigned; 2d, Performance of the conditions of the bond. One of the defendants, *Adam Pence*, filed a general demurrer to the declaration, and three of the defendants, *Young*, *Nelson*, and *Vineyard*, filed special demurrers to the declaration. The remaining defendants, *Pugh*, *McAllister*, and *Joseph Pence*, craved oyer, &c., and pleaded, 1st, *Non est factum*; 2d, Not guilty of the breaches assigned; 3d, Performance, &c. The plaintiff filed a general demurrer to *F. Dale's* pleas; a replication to the first plea of *Pugh*, *McAllister*, and *Joseph Pence*,

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and demurrers to their second and third pleas. The demurrers of *Young, Nelson, Vineyard*, and *Adam Pence*, to the declaration were overruled; and the demurrers of the plaintiff to the pleas of *Kindle*, and to the second and third pleas of *Pugh, McAllister*, and *Joseph Pence*, were sustained. *Kindle, Adam Pence, Young, Nelson*, and *Vineyard*, who failed to plead further, were defaulted, and a writ of inquiry as to damages against them was awarded. The issue on the plea of *non est factum*, and the inquest of damages against those in default, were, by consent of parties, submitted to the Court for trial and assessment, and final judgment for the plaintiff was awarded against all the defendants.

The demurrers to the pleas of *Kindle*, and to the second and third pleas of *Pugh, McAllister*, and *Joseph Pence*, were correctly sustained. The plea of not guilty to the breaches [*588] here assigned, forms no certain issue. A plea that tenders no issue is substantially bad. The plea of performance, pleaded as it was in general terms, was also bad as being no response to the breach. The plaintiff having set out the condition of the bond, and assigned breaches in his declaration, specified the particular delinquencies for which the suit was brought. The plea should have answered the breaches assigned, that an issue might have been formed without the plaintiff again spreading upon the record the particular breach complained of. Steph. on Pl., 336, 7.

The important question in this cause—arising upon the demurrers to the declaration—remains to be considered. The bond was entered into on the 12th of *August*, 1841, at which time the law required the county treasurer to make settlement, &c., with the county auditor on the second *Monday* in *January*, annually, and to pay over to the Treasurer of State the money collected for State purposes, on or before the fourth *Monday* of *January* in each year, &c. Acts of 1841, p. 31. By the revenue act of 1842, the law was so changed that the time of settlement with the county auditors, was thereafter to be the third *Monday* of *February*, and the time of paying the revenue for State purposes to the treasurer of State, the first

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Monday in March, annually. The act of 1843, R. S., p. 220, sections 68 and 69, restored the second *Monday of January* as the time of settlement with the county auditor, and the fourth *Monday of January* as the time of paying over to the State treasurer the moneys due for State revenue; and this latter act was, by the 15th section of the act entitled "An act in relation to the printing and distribution of the Revised Statutes," approved *February 13*, 1843, declared to be in force from and after the 1st day of *March* next following. Laws of 1843, p. 45. It is contended that the law in force at the time the bond sued on was executed, was a part of the contract between the obligors and the State, and that the act of 1842, by which the times at which the county treasurers were to settle with the county auditors, and to make payment to the treasurer of State, were changed, was in the nature of a contract between the payee and the principal obligor in a bond to extend the time [*589] of *performance, without the consent of the sureties, and that therefore the latter are discharged.

County treasurers are elected for a term of three years, and before entering into office, they are required to give bond for the faithful performance of their duties "according to law." The counsel for the plaintiffs in error contend, that the law in force at the time of the contract is the law which is to govern the treasurer in the discharge of his duties through his whole term; on the other hand, the defendant's counsel insist that the Legislature may, from time to time, make such changes in the revenue laws as the public good requires; and that the treasurers, according to the terms of their bonds, are bound to observe and obey them. We think the defendant's counsel have taken the right view of the question. The contract refers to laws that may be passed during the term for which the treasurer holds, as well as to the law in force at the time it was entered into. It is not necessary now to inquire, whether laws may not be passed by a Legislature for the relief of the principal obligor in a bond, the effect of which would be to discharge the sureties. This case does not call for the consideration of that question. The law relied upon in this case, as effecting

the discharge of the sureties, is a general law, having respect only to the times of settlement with the authorized agents of the government. As to such a matter, we think the Legislature intended, and the bond contemplates, that the law may be modified as experience shall show the public good demands. But if we admit that the law in force at the time of the execution of the bond, is the law contemplated by the contract, according to which the treasurer's duties were to be discharged, we are still of opinion that the act of 1842 does not destroy the contract. That act we consider as directory only to the agents of the government, and does not affect the undertaking of the sureties. This view of the statute is strengthened by what the Supreme Court of the *United States* says in the cases of *The United States v. Kirkpatrick et al.*, 9 Wheat., 720, 736; and *The United States v. Vanzandt*, 11 Wheat., 184, 190. Those cases are not, in all respects, similar to the case under consideration, yet the question arose in each of them, whether

a failure on the part of the government to require a [*590] *settlement with a holder of public moneys, at the times designated by the law in force when the bond was entered into, did not discharge the sureties from all liability for defalcations made after the designated periods. In both cases, the Court held that those provisions of the law, relative to the periods of settlement, were created by the government for its own protection, and to regulate the conduct of its own officers. They are merely directory, says the Court, to such officers, and constitute no part of the contract with the sureties.

The defendant in error insists, also, on the act of *February* 13, 1843, above cited, by which the times of settlement and payment were restored to the periods as they were fixed by law at the date of the contract, as conclusive against the plaintiffs in error. We do not think it necessary, however, to place this case on that ground, as the defendants are clearly liable irrespective of that statute.

Per Curiam.—The judgment is affirmed with costs.

H. and H. Brown, and W. W. Wick, for the plaintiffs.

H. O'Neal, W. Quarles, and J. H. Bradley, for the defendant.

COLSON v. THE STATE.

INDICTMENT—STATUTE.—If to a statute on which an indictment is founded there be an exception in a subsequent statute, the exception need not be negatived in the indictment.

LICENSE.—To authorize a person to sell foreign merchandise without license, he must have received it in exchange for articles of his manufacturing, or for products of his own agriculture.

SAME.—An indictment for selling foreign merchandise without license for money, is not sustained by proof that the merchandise was sold for produce.

ERROR to the *Union* Circuit Court.

BLACKFORD, J.—Indictment for vending foreign merchandise without license. The charge alleged in the indictment is, “that the defendant, on, &c., in eighteen hundred and forty-three, in *Union* county, &c., not having a license, &c., sold to *Anderson Sutton*, at and for the sum of six and a fourth cents, one-fourth of a pound of pepper, the same not being the product of the *United States*,” &c. Plea, not guilty.

[*591] *Cause submitted to the Court, and judgment for the State. A motion by the defendant for a new trial was overruled.

It was proved on the trial that in 1843, in *Union* county, &c., *Anderson Sutton* purchased of the defendant a quarter of a pound of pepper, for the price of five cents, which he paid for in produce, not money; that the defendant was a citizen of said county; that he kept some groceries which he received in exchange for the products of agriculture, a part of which he raised on his own farm, and the balance of which he received in exchange for groceries of his neighbours; and that the pepper in question was received by the defendant in that way. There was no other material evidence.

Subsequently to the statute prohibiting the sale of foreign merchandise, on which this indictment is founded, a statute was passed saying, “that citizens of this State who, in exchange for articles of their manufacturing or products of agriculture, receive groceries, dye stuffs, oils, paints, or cloths, may, and they are hereby authorized to, sell the same within their proper

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county without procuring a license therefor." R. S., 1843, p. 1052. The indictment is not objectionable for omitting to state, that the pepper had not been received by the defendant in exchange for articles of his manufacturing, &c., the exception being in a separate statute. It was for the defendant to show that he came within the exception. *The King v. Hall* 1 T. R., 320.

We do not think the defendant proved that his sale of the pepper without license, was protected by the last named statute; because it did not appear that he had received the pepper for articles of his manufacturing or for products of his own agriculture.

A new trial, however, ought to have been granted as the sale of the pepper, according to the indictment, was for money, but according to the evidence it was for produce. The statement that the sale was for money, was descriptive of the offense and should have been proved as laid.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Ryman, for the plaintiff.

A. A. Hammond, for the State.

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*THE STATE v. VAWTER.

ABORTION—INDICTMENT.—In an indictment for administering medicine to procure abortion, the name of the medicine need not be stated, nor need the medicine be described as noxious.(a)

ERROR to the *Johnson* Circuit Court.

BLACKFORD, J.—This is an indictment for administering medicine to produce miscarriage, &c. The charge in the indictment is, "that the defendant, on, &c., at, &c., did feloniously, willfully, and unlawfully, administer to one *Lucinda Hill*, then and there being pregnant with a child, a large quan-

(a) *Carter v. The State*, 2 Ind., 617.

Munly v. The State, in Error.

tity of medicine with intent thereby feloniously, &c., to procure the miscarriage of said *Lucinda Hill*, the administering said medicine to said *Lucinda Hill* not then and there being necessary to preserve the life of said *Lucinda Hill*, contrary to the statute, &c.

The Circuit Court quashed the indictment.

The objection made to the indictment is, that it neither names the medicine administered, nor states that it was noxious.

The language of the statute is, that "every person who shall willfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or employ any instrument, &c., with intent thereby to procure the miscarriage of any woman," &c. This statute, so far as the present case is concerned, is similar to the 2d section of the statute of 43 of Geo., 3; and it has been held that on the trial of an indictment on that section, the name of the medicine administered need not be proved; that the question is, whether the prisoner administered any matter or thing to the woman with intent to procure abortion. *Rex v. Phillips*, 3 Campb., 73. If the name of the medicine need not be proved, there seems to be no good reason for naming it in the indictment. It is also decided in the case just referred to, that the indictment need not describe the medicine as noxious.

We think the indictment ought not to have been quashed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. A. Hammond, *S. Major*, and *F. M. Finch*, for the State.

W. Quarles and *J. H. Bradley*, for the defendant.

[*593] *MUNLY v. THE STATE, in Error.

THE defendant's right, in the case of an indictment, to challenge a juror peremptorily, remains open until the juror is sworn. See *Beauchamp v. The State*, 6 Blackf., 299; 1 Chitt. C. L., 545; *Hooker v. The State*, 4 Ohio, 348.

MORRISON v. CONES.

REVOKING LETTERS OF ADMINISTRATION—PLEADING.—If an administrator be sued for a debt of the intestate, and, after the commencement of the suit, his letters of administration be revoked, he may plead such revocation in bar of the further maintenance of the action.

SAME.—If such plea be filed before any continuance of the cause, the form, viz., That the plaintiff ought not further, &c., because he (the defendant), says that since the commencement of the suit, &c., is proper.

ERROR to the *Hancock* Circuit Court.

BLACKFORD, J.—*Joseph Cones* brought an action of debt against *George L. Morrison* and *William Dæneh*, administrators of the estate of *Edward A. Fanning*, deceased. The suit was founded on a note executed by the intestate.

The declaration was filed on the 6th of *August*, 1841. Before any continuance of the suit, to wit, at the *August* term, 1841, of the Court, and on the 18th of *August*, 1841, *Morrison* pleaded in bar as follows: That the plaintiff ought not further to maintain the action against him, because he says that since the commencement of the suit, and before this day, to wit, on the 10th of *August*, 1841, at, &c., the Probate Court of *Hancock* county revoked and annulled the letters of administration before that time granted by said Probate Court to said *Morrison* of the goods and chattels of *Edward A. Fanning*, deceased; and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action against him. This plea was sworn to by *Morrison*.

General demurrer to the plea, and the demurrer sustained.

Afterwards *Morrison* made default, and judgment was rendered against him for a certain sum, to be levied of the goods of the intestate, &c.

[*594] *This judgment is erroneous. If a person sued as administrator of an estate be not such administrator, he may plead in bar of the action that he is not administrator. 2 Phill. Ev., 363. So, in the case before us, after the revocation of the letters of administration, *Morrison*

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being no longer administrator of *Fanning's* estate, might plead the fact of such revocation in bar of the further maintenance of the action.

The plea being filed before any continuance of the suit, the form, viz., That the plaintiff ought not further, &c., because he (the defendant), says *that since the commencement of the suit, &c., is proper.*

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Peaslee, J. Morrison, and S. Major, for the plaintiff.

STEVENS v. LODGE.

DISTRESS FOR RENT.—The goods of a stranger found on demised premises are liable to be distrained for rent, unless they be such as are specially exempted by the common law, or by the statute regulating distress for rent.

SAME—MORTGAGE.—Goods were mortgaged by a tenant of real estate to a stranger, and were left in the former's possession on the premises by an agreement in the mortgage. *Held*, that the facts that the mortgage was recorded, and that the landlord had made no objection to the goods remaining on the premises, were no evidence that the goods were on the premises with the landlord's consent.

SAME.—The landlord's claim on goods distrained on demised premises is not limited to one year's rent.

ERROR to the Jefferson Circuit Court.

BLACKFORD, J.—This was a trial of the right of property under the 9th section of the act of 1838, regulating distress for rent. The cause was submitted to the Court on an agreed case. The material facts are as follows:

George Fitzhugh is tenant of certain premises called *The Madison Hotel* under *Lodge* the defendant, and was such tenant from the 1st of *February*, 1837, to the 1st of *February*, 1842, at an annual rent of \$500. On the 1st of *February*, 1842, there was a balance of the rent unpaid of \$1,128. In *April*, [*595] 1842, *Lodge* procured a warrant of *distress, &c., by virtue of which certain personal property, consisting of horses, carriages, household and kitchen furniture, &c., found

upon said premises, was distrained for the rent due as aforesaid. The said *George Fitzhugh* and one *George D. Fitzhugh*, on the 1st of *January*, 1840, mortgaged a part of the property distrained to *Stevens*, the plaintiff, to secure the payment of a just debt, on the 1st of *January*, 1841. *George Fitzhugh* was, by an agreement in the mortgage, to continue in possession of the property, and use the same, for a reasonable rent, until the debt became due. This mortgage, after being acknowledged, was recorded on the 13th of *January*, 1840. On the 19th of *June*, 1841, the mortgagors aforesaid executed another mortgage to *Stevens*, to secure said debt. This mortgage recites the first one, extends the time for the payment of the debt until the 19th of *June*, 1842, and embraces the property first mortgaged and the residue of the property distrained. It gives the mortgagors leave to possess and use the property described in both mortgages until the 19th of *June*, 1842, for a reasonable rent. This mortgage being acknowledged, was recorded on the 10th of *July*, 1841.

The Circuit Court, upon the above facts, gave judgment that the property in question was subject to the distress.

The plaintiff contends that the goods were not liable to the distress, because they did not belong to the tenant. The common law on the subject is certainly against him. He relies, however, on the 5th, 8th, 9th, and 12th sections of the act regulating distress for rent. R. S., 1838, p. 472. The 5th section has reference only to the landlord's claim for rent, when his tenant's goods are taken in execution. The 8th section only provides for the distraining of the tenant's cattle and stock, and of corn, grass, &c., growing on the premises. Those sections, therefore, can not affect the case. The 9th section provides for a trial of the right of property distrained, when claimed by a stranger. As there are many cases, not only by the common law, but also by the statute above cited, where a stranger has a right to his property when distrained for rent on the demised premises, it must be presumed that the 8th section was intended to provide for such cases. The 12th section, [*596] we think, instead of supporting the plaintiff's *posi-

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tion, is against it. This section does not attempt to destroy the general rule, by which a stranger's goods are subject to distress for rent, if found on the demised premises, but only enumerates various exceptions to it. It states that personal property deposited with a tenant, with the consent of the landlord, or hired by such tenant, or lent to him with the like consent, shall not be distrained for any rent due to such landlord, nor shall any other property belonging to any other person than the tenant, which shall have accidentally strayed on the demised premises, or which shall be deposited with a tavern-keeper, or keeper of a boarding-house, or with the keeper of any warehouse, in the usual course of business, or deposited with a mechanic or other person for the purpose of being repaired or manufactured, be subject to distress or sale for rent. It appears to us that this section of the statute, by enumerating and declaring these cases of exemption, clearly recognizes the existence of the general rule to which we have referred.

The plaintiff further contends, that as the defendant had, by the record, notice of the mortgages, and made no objection, the goods must be considered to be on the premises with the defendant's consent. This argument is untenable. The facts relied on are no evidence, in our opinion, that the defendant consented that the goods should be on the premises.

The last point urged by the plaintiff is, that the goods, if liable at all, were liable only for one year's rent. The plaintiff must be wrong in this. There is nothing in the common law or in the statute which thus limits the demand for rent. The provision in the statute that the landlord's claim, where his tenant's goods are taken in execution, shall not exceed one year's rent, has no application to the case of a distress.

The goods distrained in this case having been found on the demised premises, and not being such as are exempt from distress for rent, either by the common law or by statute, were liable to the warrant of distress.

Per Curiam.—The judgment is affirmed with costs.

S. C. Stevens, for the plaintiff.

M. G. Bright, for the defendant.

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*JACKSON v. ADAMSON

PRINCIPAL AND SURETY—SET-OFF.—If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against his note payable to the principal and held by him.

SAME—PAYMENT.—Such payment is also a good set-off against the said note in the hands of an assignee, if notice of the assignment had not been given to the maker before the payment became a valid demand against the payee.(a)

APPEAL from the *Madison* Circuit Court.

SULLIVAN, J.—This was an action of assumpsit brought by *Enos Adamson*, assignee of *Thomas Adamson*, who was assignee of *William Goodwin*, against *Jackson* on a promissory note. The defendant pleaded: 1, Non-assumpsit. 2, Payment to *Goodwin*, for that, &c., before the assignment of the note, *Goodwin* was indebted to the defendant in the sum of \$500 for money lent and advanced, and for money paid, laid out, and expended for his use and at his request, &c.; and for that the defendant, on the 15th of *November*, 1840, as the surety of *Goodwin*, and at his request, paid to one *Farnsworth* the sum of \$300, &c. *Similiter* to the first plea, and replication to the second, denying the payment. By consent of parties, the Court tried the cause. Judgment for the plaintiff.

The facts of the case are as follows, viz.: On the 20th of *March*, 1839, *Goodwin*, together with *Jackson* and others as his sureties, executed two writings obligatory payable to *Farnsworth* on the 1st day of *September*, 1841, one for the sum of \$300, and the other for the sum of \$80.00. On the last-mentioned note there was a credit for \$40.00. The consideration of the notes was a tract of land sold by *Farnsworth* to *Goodwin*. In *May*, 1840, *Jackson* purchased the same land from *Goodwin*, paid part of the purchase-money, and gave his promissory note to *Goodwin* for the sum of \$340, payable on the 1st day of *September*, 1841, so that the amount and day of payment should correspond with the amount owing by *Good-*

(a) *Rawlings v. Fisher*, 24 Ind., 52.

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win to *Farnsworth*, and the time at which it would become due. It was agreed between *Goodwin* and *Jackson*, at the time of their contract, and when said promissory note [*598] was given, that *Goodwin* should *exchange said note with *Farnsworth* for the writings obligatory on which *Jackson* was bound as surety for *Goodwin*, and the note was given by *Jackson* on the express condition that it should be so used. In *November*, 1840, *Goodwin* having failed to take up the writings obligatory which *Farnsworth* held, *Jackson* paid to *Farnsworth* the full amount of the debt. In *January*, 1841, *Goodwin* assigned *Jackson's* note to *Thomas Adamson*, and in *July* following, *Thomas Adamson* assigned it to the plaintiff.

When *Jackson* lifted the notes held by *Farnsworth*, his liability as the surety of *Goodwin* had not attached. The notes were not yet due, and no default had been made by *Goodwin* in the performance of the engagement for the fulfillment of which by *Goodwin*, *Jackson* had made himself responsible. The payment, therefore, made by *Jackson* to *Farnsworth*, viewing it in the light merely of a payment by a surety for his principal, was not compulsory but voluntary. A surety is not authorized to discharge a debt so as to make the principal his debtor until default has been made by the principal in the performance of his engagement. Pitman on Principal and Surety, 130. But if *Jackson* could not, by paying to *Farnsworth* *Goodwin's* debt before it became due, have a legal set-off against his note in *Goodwin's* hands from the time of such payment, yet, when the notes fell due, such payment would be a legal demand against *Goodwin*, and consequently a set-off against *Jackson's* note in *Goodwin's* hands. If so, it is a good set-off against the note in the hands of an assignee, if *Jackson* had no notice of the assignment; for the statute is express that the assignee shall allow all just set-offs, discounts, and defense, not only against himself, but against the assignor, before notice of the assignment shall have been given to the defendant.

In the case before us, the plaintiff failed to prove that notice of the assignment had been given to *Jackson* before his claim against *Goodwin* had become a legal set-off.

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We purposely refrain at present from inquiring into the effect of the agreement between *Jackson* and *Goodwin*, that the latter should lift, with the note of the former, the notes in *Farnsworth's* hands; and also from considering whether *Jackson* had a right to pay the notes in *Farnsworth's* [*599] hands, *so as to discharge the lien which *Farnsworth* had on the land conveyed by *Goodwin* to *Jackson* for the purchase-money. These are matters in defense which it will be time enough to consider when the plaintiff shall have made out his case.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Smith and *S. Yandes*, for the appellant.

W. Quarles and *J. H. Bradley*, for the appellee.

LOMAX v. BAILEY.

PLEADING—PRACTICE.—Where two pleas are substantially the same, one of them should be rejected on the plaintiff's motion.

SAME.—A demurrer to a plea assigning for cause that the plea is double without showing in what the duplicity consists, is a general demurrer.

ENTIRE CONTRACT—PART PERFORMANCE.—Where one party to a special entire contract has not complied with its terms, but, professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted, no action will lie on that contract for the work done or thing delivered; but the party who has been thus benefited by the labour or property of the other, will be responsible on an implied promise, arising from the circumstances, to the extent of the value received by him.(a)

APPEAL from the *LaPorte* Circuit Court.

DEWEY, J.—*Bailey* sued *Lomax*, and another against whom process was returned “not found,” in covenant. The declaration alleges that, on, &c., it was mutually agreed between the parties, that the defendants should furnish the plaintiff with materials necessary for making and painting one hundred win-

(a) *Wolcott v. Yeager*, 11 Ind., 84; 10 Id., 199; 9 Id., 497; 5 Id., 142, 261; 4 Id., 79.

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nowing machines, on the plan of *Lomax's* patent, and that the plaintiff should make and paint, in a neat and workmanlike manner, on the plan of *Lomax's* patent, one hundred of said machines, and deliver them to the defendants, so soon as three mechanics by reasonable labour could complete them; and that the defendants should pay to the plaintiff \$3.00 per machine, provided it should take him but two days of faithful labour to make a machine, but if it required a longer time, then the price to be proportionably increased; the payment to be made out of the proceeds of the first sale of the machines by the

defendants, and as soon as a reasonable time for selling the same should have elapsed, after their completion. The declaration further alleges that the plaintiff finished fifty machines in a neat and workmanlike manner, according to the designated plan, so soon as they could be made by three mechanics; that although he was always ready to complete the residue of the machines according to the contract, the defendants failed to furnish the materials necessary for that purpose, though requested so to do, whereby the plaintiff was unable to make the other fifty machines or any of them; that, on, &c., he delivered to the defendants the fifty finished machines, which they received and accepted; that to finish each machine required three days of faithful labour, making the aggregate price of the fifty machines \$225. The breach assigned is, that although a year had elapsed after the delivery of the machines, and although the defendants had a reasonable time to make the money by the sale of them, and although the money had been long due to the plaintiff, the defendants, though requested to pay, had entirely failed to do so.

The defendant, *Lomax*, pleaded eight pleas, two of which were properly rejected on the motion of the plaintiff, because they were substantially the same as the fifth plea. The other pleas (except the fifth, which led to an issue of fact) were demurred to, and the demurrers sustained. Verdict and judgment for the plaintiff.

The fourth plea is the only one necessary to be noticed in

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reference to the demurrers, as the others were clearly bad, and involved no question of importance. The fourth plea was, that at the time the plaintiff ceased working at the machines after finishing fifty, he had on hand good materials, furnished by the defendants, sufficient for making ten more machines; and that the defendants were at all times ready to furnish the materials for the whole hundred machines, and to receive and pay for them according to the contract, if the plaintiff would perform his covenant, of which he had notice; but he did not and would not perform his covenant in this, that he did not make the fifty machines which were delivered in a neat and workmanlike manner, nor would he so make the residue. The demurrer to this plea assigned for cause that it "was double," without showing in what the duplicity consisted.

[*601] *The first question presented is, whether the demurrer is special or general?

We consider it to be a general demurrer. The cause assigned is not sufficiently explicit. It should have particularized the duplicity complained of; not having done so, it stands as a general demurrer. *Lamplugh v. Shortridge*, Com. R., 115; 1 Saund., 160, n. 1; Id., 337, n. 3.

The next question is, does the plea constitute a substantial legal defense to the action?

The contract described in the declaration is an entire executory contract. The whole consideration of the defendants' promise to pay, was the performance by the plaintiff of the work which he engaged to do, to wit, the making and painting one hundred winnowing machines in the stipulated manner, so soon as they could be completed by three mechanics. The performance of this work, or a legal excuse for non-performance, was in the nature of a condition precedent to the plaintiff's right of action. The declaration accordingly avers performance in part, and an excuse for not performing the residue; it alleges that the plaintiff finished fifty machines in the manner required by the contract, and that he was prevented from making the other fifty by the failure of the defendants to furnish the necessary materials. The plea negatives both of these

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averments; and it must be a valid defense to the action, unless the fact that the defendants received fifty machines (which is averred by the declaration and admitted by the plea) varies the case. We do not see how it can have that effect. The averment that these fifty machines were made in the manner stipulated by the contract, and the averment that the defendants failed to furnish the materials for the other fifty, still stand contradicted; and the demurrer admits the contradiction to be true. The case presented is one of an entire contract, in which the entire performance on the part of the plaintiff constitutes the whole consideration of the defendants' promise, and in which an entire performance, or what is equivalent to it, is admitted not to have taken place. The condition precedent has not been performed, nor its performance excused. So far the case is plain. The plea is a good bar, and the demurrer [*602] to it should *have been overruled. This must reverse the judgment of the Circuit Court.

But for the purpose of meeting a question which arose from certain instructions which were given, and from others which were refused, on the trial of the issue formed on the fifth plea, we will proceed and view the fourth plea as if it were the same as the fifth, which was, that the fifty machines which were delivered were not made in a neat and workmanlike manner.

This view of the case admits the existence of the excuse alleged by the plaintiff for not making fifty of the machines which he contracted to make, and it admits that the defendants accepted fifty machines different from and inferior to those called for by the contract. It in fact presents a case in which neither party has complied with his contract. And the question is whether, under the circumstances, this action can be supported on that contract. If it can, it will follow, that, had the defendants furnished the materials for the whole hundred machines, and the plaintiff had finished that number but not in the manner in which he contracted to finish them, and the defendants had accepted them, the plaintiff could have maintained an action and recovered the contract price, whatever might have been the real value of the machines. And it must

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also follow, for aught that we can see, that he might have sustained a suit on the contract without at all adhering to its terms in his averments as to the manner of finishing the machines. It would only be necessary for him to allege that he made one hundred machines, and that the defendants accepted them. To sustain this principle would be not to enforce the contract made by the parties, but to make one for them. Besides, if it be true, that making and delivering machines, inferior to those prescribed by the contract, can be such a performance of the covenant of the plaintiff as to entitle him to sustain an action for the stipulated price, it must be also true, that such making and delivery would constitute a good defense to an action by the present defendants against him for not making them according to the contract. Such, we think, can not be the effect of the acceptance by the defendants of the machines in this case.

We conceive it to be necessary for the plaintiff to [*603] maintain his *action, to allege and prove that the machines which he delivered were made in the manner stipulated in the contract; and that the acceptance of them by the defendants does not estop them from denying that fact, and proving the contrary.

Questions like the present have given rise in this country and in *England* to decisions, which it is difficult, if not impossible, to reconcile. But no Court, we believe, has professedly repudiated the doctrine, that, in declaring on a special entire contract, in which the performance of something by one party constituted the whole consideration of the promise of the other party, there must be an averment of entire performance shown by the party seeking a remedy, or an excuse for not performing. And so long as this doctrine is preserved, we are unable to perceive on what legal ground (technical, perhaps it may be) this action can be sustained, if the fifty machines which were accepted by the defendants were different from, and inferior to, those for which they contracted. The authorities bearing on this subject are very numerous. It would be useless to review them in detail. The principle which they established is this, that when one party to a special entire contract has not com-

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plied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted, no action will lie on that contract for the work done or thing delivered; but that the party, who has been thus benefited by the labour or property of the other, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him. Thus the rules of pleading in regard to special contracts are preserved, and no injustice is done. The following authorities support this position, and the more particular views which we have taken of the subject. 1 Chitt. Pl., 325; 1 Saund., 320, n. 4; *Cook v. Jennings*, 7 T. R., 377; *Littler v. Holland*, 3 T. R., 590; *Ship-ton v. Casson*, 5 B. & C., 382; *Oxendale v. Wetherell*, 9 B. & C., 386; *Sinclair v. Bowles*, Id., 92; *Cooke v. Munstone*, 1 N. R., 351; *Parmeter v. Burrell*, 3 C. & P., 144; Bull. N. P., 139; *Osgood v. Groning*, 2 Campb., 466; *Lucas v. Godwin*, 3 Bingham N. C., 737; *Sinard v. Patterson*, 3 Blackf., 353, and note; *Linningdale v. Livingston*, 10 Johns., 36; *Canby v. Ingersol*, 4 Blackf., 493.

[*604] *Most of the cases cited by the appellee have reference to goods or articles furnished to order by merchants or manufacturers, or to goods sold by sample. In these cases, no doubt, the rule is, that if the purchaser do not return the goods or article within a reasonable time after he discovers they do not conform to the order or sample, but keeps them, he affirms the contract, and in the absence of fraud or a warranty, is liable for the contract price. But there is this important distinction, to name no other, between those cases and the present one. In them, the purchaser can rescind the contract, and by returning the thing purchased, place the parties in *statu quo*. Here the defendants could not place themselves in that situation. By refusing to receive and keep the machines, they would have left the materials furnished by them in the plaintiff's hands, and the contract would have remained open. The cases alluded to, therefore, are not applicable to this cause.

Barnes v. Tannehill.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. W. Chapman and J. S. Newman, for the appellant.

J. and J. H. Bradley, for the appellee.

THE STATE, on the Relation of VANCE, County Treasurer,
&c., v. LAHUE and Others, in Error.

IN a suit by the State, on the relation of a county treasurer, on a collector's bond, the relator is not liable for costs. R. S., 1843, p. 696; *Jones et al. v. The State*, 5 Blackf., 141.

BARNES v. TANNEHILL.

REPLEVIN—VARIANCE.—Replevin. The first count charged the tortious taking and unlawful detaining of the plaintiff's horse. The writ commanded the sheriff to summon the defendant to answer the plaintiff concerning the unlawful detention of the plaintiff's horse, &c. *Held*, on demurrer to that count, that the variance was fatal.

[*605] SAME—ESTRAY.—To the second count, which was for unlawfully detaining the plaintiff's horse, the defendant pleaded, that at the time, &c., viz., on the 20th of *June*, 1840, at the county aforesaid, the horse was taken up by the defendant as an estray, he being then and there going astray, at defendant's place of residence in *Indian Creek* township, in said county, and the defendant being then and there a freeholder; that by virtue of said taking up of the horse, the defendant had a right to detain him, and did detain him, until as hereinafter mentioned; that afterwards, viz., on the 22d of *June*, 1840, at the county aforesaid, the defendant, pursuant to law, caused said taking up of the horse to be advertised in three of the most public places in said township, giving in the advertisement a particular description of the horse, and the time when he was taken up; that afterwards, viz., on the 25th of *June*, 1840, and before ten days had expired after advertising as aforesaid, the plaintiff brought this action of replevin, by virtue of which he then and there obtained possession of the horse, &c.; and this the defendant is ready to verify; wherefore he prays judgment, &c. *Held*, on special demurrer, that the plea was good.

ERROR to the *Lawrence* Circuit Court.

BLACKFORD, J.—This was an action of replevin. The declaration contains two counts. The first is for tortiously taking and unlawfully detaining a certain bay horse belonging to the plaintiff. The second is for unlawfully detaining a certain other bay horse belonging to the plaintiff.

The writ, *oyer* of which was obtained by the defendant, commanded the sheriff to summon the defendant to appear, &c., and answer the plaintiff of and concerning the unlawful detention of the plaintiff's horse, &c.

Demurrer to the first count, because of the variance between that count and the writ; the former alleging a tortious taking, the latter only an unlawful detention. Demurrer sustained.

Pleas to the second count, 1, *Non detinet*; 2, that at the time, &c., viz., on the 20th of *June*, 1840, at the county aforesaid, the horse mentioned in the declaration was taken up by the defendant as an estray, said horse being then and there going astray, at defendant's place of residence in *Indian Creek* township, in said county, and the defendant being then and there a freeholder; that by virtue of said taking up of the horse, the defendant had a right to detain him, and did detain him, until as hereinafter mentioned; that afterwards, viz., on the 22d of *June*, 1840, at the county aforesaid, the defendant, pursuant to law, caused said taking up of the horse to be advertised in three of the most public places in

said township, giving in the advertisements a particular [*606] *description of the horse, and the time when he was taken up; that afterwards, viz., on the 25th of *June*, 1840, and before ten days had expired after advertising as aforesaid, the plaintiff brought this action of replevin, by virtue of which he then and there obtained possession of the horse, &c.; and this the defendant is ready to verify; wherefore he prays judgment, &c.

Special demurrer to this plea, and the demurrer overruled. Judgment for the defendant.

The first count is bad, in consequence of the variance pointed out by the demurrer.

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The plaintiff assigned various causes of demurrer to the second plea. One is, that the plea amounts to the general issue. The general issue is *non detinet*, which is a denial of the defendant's detention of the plaintiff's goods. The plea demurred to admits the detaining of the plaintiff's horse, but sets up matter in avoidance. Another cause assigned is, that the place where the horse was taken up is not sufficiently stated, the words "the county aforesaid," being used when no county had been previously mentioned in the plea. We think, however, that the county named as a venue in the declaration is referred to by said words, "the county aforesaid." There are other objections made to the plea, viz., that it omits to aver that the defendant was not guilty of any abuse of the horse; that he had not suffered him to be worked; that he did not drive him out of the woods, &c. These objections are untenable. If the defendant, in regard to the estray, violated the law, that was matter to be replied. It is also objected, that the manner in which the writ of replevin was obtained is not properly set out. We think the averment in the plea relative to the action of replevin was unnecessary, and may be treated as surplusage. Another cause of demurrer assigned is, that the plea should not have concluded with a verification, but with a prayer for a return of the horse. The verification is right. The plea prays "for a judgment, &c." There might have been a prayer for a return, but the omission is not objectionable even on special demurrer. A mere prayer of judgment, not specifying any particular *kind* of judgment, is sufficient. Gould on Plead., 298, and [*607] the *cases there cited. There are some other causes of demurrer assigned, but they are unimportant.

Two bills of exceptions were taken by the plaintiff, but they show no error in the proceedings.

Per Curiam.—The judgment is affirmed with costs.

J. S. Watts, for the plaintiff.

C. P. Hester, for the defendant.

Morris v. The State.

MORRIS v. THE STATE.

FRAUDULENT VOTING—EVIDENCE.—On the trial of an indictment under the act against fraudulent voting, the defendant's statements made under oath at the polls, on being challenged, are not admissible evidence for him; nor is the decision of the judges of the election in favour of his right to vote any defense.(a)

CHALLENGE OF JURY.—The defendant's right, in the case of an indictment, to challenge a juror peremptorily, remains open until the juror is sworn.

ERROR to the *Marion Circuit Court*.

SULLIVAN, J.—This was an indictment under the act of 1843, p. 153, against fraudulent voting. Plea, not guilty. Verdict of guilty, and judgment on the verdict.

On the trial, after the testimony on behalf of the State was closed, the defendant offered to prove that at the election held, on, &c., as stated in the indictment, he was challenged as not being a legal voter; that he was thereupon sworn by the inspector; and that the inspector and judges decided that he was a legal voter. He also offered to prove what his statements, made under oath, were when challenged at the polls. The Court permitted him to prove that he was challenged, that he was sworn, and that it was decided that he was a legal voter, but they would not allow him to give his statements in evidence. The defendant then asked a witness, who was one of the judges of the election, whether he, the defendant, affirmed his right to vote, or whether he merely submitted the matter to the inspector and judges, but the Court would not allow the question to be asked.

We think the Court did not err on either point. It was competent for the defendant to prove the same facts, by disinterested witnesses, that he swore to at the polls, but he [*608] *could not, by giving his own statements in evidence, make testimony for himself. Nor can the determination of the judges of the election, in favour of the defendant's

(a) *Boone County Bank v. Wallace*, 18 Ind., 82.

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right to vote, avail him as a defense in this case. The judges may have been imposed upon by the statements of the defendant, or they may have mistaken the law. If their decision, under such circumstances, was final, the statute, under which the defendant is indicted, would be a dead letter.

While the Court was impanneling the jury to try the case, a question arose, substantially the same as that which arose in the case of *Munly v. The State*, decided at this term, relative to the time at which the defendant's right to challenge a juror peremptorily should cease. The defendant challenged a juror before he was sworn, but the Court would not allow the challenge. It is unnecessary to encumber this opinion with the facts stated in the bill of exceptions, they being substantially the same as those in the case referred to. The Court erred in refusing the challenge. In *Munly v. The State*, we decided that the right of a defendant charged with a criminal offense to challenge a juror peremptorily remains open until the juror is sworn. The judgment must, therefore, be reversed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

O. H. Smith, W. Quarles, and J. H. Bradley, for the plaintiff.

A. A. Hammond, for the State.

THOMPSON and Others v. FRY.

ACCOUNTS—EVIDENCE.—In assumpsit against partners for goods sold and delivered, the plaintiff having proved that one of the defendants had examined his (the plaintiff's) books, containing the items of his account against the defendants, and had acknowledged them as they were stated in the books to be correct, offered to prove said items by parol evidence, without producing the books or accounting for their absence. *Held*, that the evidence was inadmissible.

[*609] *APPEAL from the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Assumpsit by *Fry* against the appel-

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lants, as partners, for goods sold and delivered. Plea, the general issue. Verdict and judgment for the plaintiff. On the trial of the cause, the plaintiff having proved that one of the defendants had examined the books of the plaintiff containing the items of his account against the defendants, and had acknowledged them, as they were stated in the books, to be correct, offered to prove the items of said account by parol testimony, without producing the books or accounting for their absence. The defendants objected, but the Court overruled the objection, and admitted the testimony. This is the only error complained of.

The defendants contend that the acknowledgment was made with reference to the particular items examined, and that, consequently, the books were the best evidence of the items so admitted, and should have been produced.

We think the defendants have taken the correct view of the case. The admission was that the contents of the plaintiff's books, in the particulars referred to, were correct. It is like the admission of the contents of any other writing, which can only be proved by the best evidence within the reach of the party, that is, the instrument itself, unless its absence be accounted for. The distinction between the admission of a party that he owes to another person a certain sum for goods sold and delivered, and an admission that certain *items* of an account are correct, must be made in this case. The case of *Wilt v. Bird*, November term, 1844, sustains the view we have taken of the case.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, for the appellants.

G. S. Orth, for the appellee.

Fisher and Another v. The State Bank.

[*610] *FISHER and Another v. THE STATE BANK.

PROTEST—EVIDENCE.—A protest of a promissory note negotiable and payable at a branch of the State Bank, alleging that the notary had demanded payment of the note, &c., and given notice of its dishonour, &c., is legal evidence.(a)

SAME—NOTICE.—One of the indorsers of such note lived about a mile from *Fort Wayne*. Held, that notice of the dishonour of the note addressed to him at *Fort Wayne*, and put into the post office at that place, was sufficient.(b)

TIME, COMPUTATION OF.—In computing the time for payment of such note, payable a certain number of days after date, the day of the date is excluded and the demand of payment should be made on the third day of grace.

ERROR to the *Noble* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by the State Bank against *Horace B. Taylor* and *Sterns Fisher*, as indorsers of a promissory note negotiable and payable at the branch at *Fort Wayne* of said bank.

The declaration alleges that the note was made on the 19th of *July*, 1842, by one *Marshall S. Wines*, since deceased; that it was payable to *Taylor* ninety days after date; that afterwards, on the day it was made, it was indorsed by the payee to *Fisher*, and by the latter to the plaintiff. The dishonour and notice are averred.

Plea, non-assumpsit. There is also a special plea, which we understand to mean that the defendants indorsed the note before it was signed, and left it with the bank to have it signed with the names of *Wines* and *Jacoby*; and that the bank caused the name of *Wines* alone to be put to the note as maker, without the defendants' consent. Replication in denial of the special plea.

Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The only question is, does the evidence support the verdict?

The plaintiff gave in evidence the note and indorsements described in the declaration, and also introduced a protest of

(a) *Turner v. Rogers*, 8 Ind., 139.(b) *Sharpe v. Drew*, 9 Ind., 281.

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the note for non-payment, made on the 20th of *October*, 1842, in which it is stated that the notary had, on the day of the protest, deposited in the post office at *Fort Wayne* written notices of the dishonour of the note, one being addressed to

Taylor, present, and the other to *Fisher*, *Peru*, *Ind.*

*611] There *was also evidence from which the jury might have inferred that *Taylor* lived about a mile from *Fort Wayne*, that *Fisher* lived at *Peru*, and that *Wines* had executed the note. The defendants attempted to prove the facts alleged in their special plea, but failed.

There are various instructions to the jury copied into the transcript, but they are no part of the record.

The motion for a new trial was correctly overruled.

The statute of 1838 makes a certificate, purporting to be the official act of a notary, &c., legal evidence. R. S., 1838, p. 274. We think that by the statute of 1842, the notary was authorized to demand payment of the note, and give notice of its dishonour. Stat., 1842, p. 79. Such acts of the notary being authorized, his certificate of their performance is admissible evidence under the first named statute. The protest, in this case, is such a certificate. The address of the notice to *Taylor*, present, which means an address to him at *Fort Wayne*, into the post office of which place the notice was deposited, is correct according to the evidence. *Timms v. Delisle*, 5 Blackf., 447; *Bell v. The State Bank*, *May* term, 1845. In computing the time for payment of the note, the day of the date was correctly excluded. The demand for payment was rightly made on the last day of grace. *Piatt v. Eads*, 1 Blackf., 81, and note.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

D. H. Colerick, *J. G. Walpole*, and *H. Cooper*, for the plaintiffs.

W. H. Coombs and *I. H. Kiersted*, for the defendant.

The State v. Best and Another.

THE STATE v. BEST and Another.

HABEAS CORPUS—PRACTICE.—When a *habeas corpus* issues on a complaint of illegal imprisonment, the judge who issues the writ may, if the authority by which the prisoner is detained be defective, call before him witnesses, inquire into the guilt of the prisoner, and remand, recognize, or discharge him, as he may think proper.

SAME—BAIL.—The judge before whom a prisoner is brought by *habeas corpus* for the purpose of giving bail, may exercise his own discretion as to the amount of the penalty of the recognizance, without regard to the amount fixed by the magistrate who committed the prisoner.

[*612] *ERROR to the *Jefferson* Circuit Court.

DEWEY, J.—This was a *scire facias* against the defendants in error on a recognizance for the appearance of one of them, *Best*, in the Circuit Court, to answer to a charge of passing counterfeit money. The defendants craved *oyer* of the “recognizance and other papers,” and demurred generally. It appeared by the *oyer* granted, that *Best* had been found guilty before the mayor of *Madison* of passing counterfeit paper money: that he had been required by the mayor to recognize, with surety, in the sum of \$300, for his appearance before the Circuit Court to answer the charge preferred against him, and that failing to do so, he had been committed to jail on the *mitimus* of the mayor. He petitioned an associate judge for the writ of *habeas corpus*, to enable him to give bail as required by the mayor. The writ issued; he was taken before the judge, who, after hearing testimony, ordered him to recognize, with surety, in the sum of \$600 for his appearance at the Circuit Court; he gave the recognizance set forth in the *scire facias* and was discharged. The Circuit Court sustained the demurrer, and rendered a final judgment in favour of the defendants.

We are not informed on what ground the Court below sustained the demurrer; nor is any attempt made here to support the judgment. The *scire facias* might, perhaps, have been more formal, but we think it is substantially good. It sets out

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that the recognizance (which is valid upon its face) was taken before an associate judge of the proper county; that it was returned to the Circuit Court and there recorded; that the recognizers made default; that judgment of forfeiture was rendered against them; and that the recognizance was in full force, unsatisfied, &c.

We have not examined whether the *mittimus* of the mayor was sufficient to authorize the detention of *Best* in jail, because, admitting it to be defective, the statute authorizes the judge, who issues a *habeas corpus* on complaint of illegal imprisonment, to call witnesses before him, inquire into the guilt of the prisoner, and to remand, recognize, or discharge him, as he may judge proper. R. S., 1838, p. 327. We do not conceive it to be any objection against the validity of the recognizance, that the penalty fixed by the judge was [*613] greater *than that required by the mayor. The former had a right to be guided by his own discretion on that subject. We see no ground on which to support the demurrer.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the State.

M. G. Bright, for the defendants.

SHEETS v. PEABODY.

DECREE OF FORECLOSURE.—On a decree of foreclosure and for a sale of the land mortgaged, the sale should be made in conformity with the statute in force when the mortgage was executed.(a)

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed in 1840

(a) *Franklin v Thurston*, 8 Blackf., 160.

by *Peabody*, as administrator of one *Soper*, against *Sheets*. It is a bill of foreclosure, and prays a sale of the mortgaged premises situate in *Jefferson* county in this State. The mortgage was executed on the 3d of *January*, 1835, and was made to secure the payment of a certain debt payable four years after date with interest. The place where the mortgage was executed is not shown. The parties submitted the cause to the Circuit Court on the bill and exhibits.

The Court, in *April*, 1843, decreed that the mortgaged debt, with interest and costs, be paid within thirty days, and, in case of non-payment, that the equity of redemption be foreclosed; that the premises be sold at public auction to the highest bidder for cash, without appraisement or valuation, first giving notice, &c.; that the rents and profits for seven years be first offered for sale; and that the officer proceed according to the statute on the subject, approved the 4th of *February*, 1831.

The only objection made to this decree is, that it requires the land to be sold without appraisement or valuation.

At the time the mortgage was executed, the statute of 1831, referred to in the decree, was in force; and if that statute governs the case, the decree is unobjectionable, no appraisement or valuation of the land being required by that [*614] *statute. But at the time the decree was rendered, there was a statute declaring that no property, real or personal, should be sold on execution, or by virtue of any other process, for less than its appraised value, except, &c. Stat 1843, p. 15. If the last named statute is to govern, the decree is erroneous. We must presume, the contrary not appearing, that the mortgage was executed in this State. It has been decided by the Supreme Court of the *United States*, in a case like the present, that the decree as to a sale of the property must conform to the statute in force when the mortgage was executed. *Bronson v. Kinzie et al.*, 1 Howard, 311. This decision of the Supreme Court of the *United States*, whether correct or not, is obligatory on us. Should we decide contrary to it, our judgment would of course, in case of a writ of error, be reversed by that Court. We decide, therefore, that as the

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decree before us is in conformity with the statute in force when the mortgage was executed, it must be affirmed. We have heretofore expressed a similar opinion to the one now given. *Doe d. Wolf et al. v. Heath et al.*, May term, 1844.

Per Curiam.—The decree is affirmed with 1 *per cent.* damages and costs.

M. G. Bright, for the plaintiff.

W. Lyle, for the defendant.

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1. A joint debtor with a bankrupt has a contingent claim on the latter, which is provable under the commission of bankruptcy; and the bankrupt's certificate will bar a suit against him for contribution.—*Dean v. Speakman*.....317
2. To render a certified bankrupt a competent witness for his co-debtor in an action for the joint debt, the bankrupt must release to his assignee all claim to surplus and allowance. *Ibid.*

3. After a person has been declared a bankrupt, and his goods have passed to his assignee, he has no right of property or of possession in the goods.—*Redman et al. v. Gould*.361

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY.

Debt lies in this State on a judgment rendered in *Ohio* against the father of a bastard child charging him with a certain sum, payable by installments, for the child's maintenance; but the declaration must show that the plaintiff had maintained the child, and thus entitled himself to the money sued for.—*Stanfield et ux. v. Fetters*.....558

BILL OF EXCEPTIONS.

The judges of the Circuit Court are not bound to seal a bill of exceptions which requires the clerk to insert therein copies of certain papers after the bill shall have been sealed.—*The Board of Trustees, &c., v. Embree*.....461

BILL OF PARTICULARS.

See SET-OFF, 3, 4.

BILL OF REVIEW.

See CHANCERY, 2, 3, 4, 5, 6, 23.

BILLS OF EXCHANGE.

1. A paper purporting to be a bill of exchange, having a blank for the payee's name, may be filled up at any time by a *bona fide* holder; but until it is so filled up, a suit will not lie on it against the acceptor.—*Greenhow v. Boyle*.....56
2. In an action for money had and received, &c., by the drawer against the acceptor of such blank bill, the bill is not sufficient evidence to support the suit.....*Ibid.*
3. If the indorsee of a bill of exchange give time to the drawer for a valuable consideration, he thereby discharges the indorser.—*The State Bank v. Wymond et al.*.....363
4. To authorize the payee to recover against the drawer of a bill of exchange in which no time for payment is specified, he must present the bill to the drawee for acceptance or payment within a reasonable time

after it is received.—*Dumont v. Pope et al.*.....367

5. A statement in a protest of such bill for non-acceptance, that the reason given by the drawee for non-acceptance was that he had no effects of the drawer, is no evidence of the want of effects.....*Ibid.*
6. If an order drawn by *A* upon *B* be not a bill of exchange, there can be no recovery by the payee against the drawer without proof of consideration*Ibid.*
7. In a suit on a bill of exchange payable to a firm, brought by the drawer, who had paid the bill, against the acceptor, it is sufficient to describe the bill in the declaration as payable to the firm, without setting out the names of the members of the firm.—*Phipps et al. v. Addison et al.*.....375
8. If a demurrer to the declaration in such case be overruled, the Court may assess the damages so far as the amount due on the bill of exchange is concerned; but in respect to the costs of protest, if chargeable at all, there should be a jury of inquiry.
Ibid.

BOATS.

See LIEN, 4.

BOND.

See CONSTABLE, 2. DELIVERY-BOND.
REPLEVIN, 1, 2, 3, 4, 5, 6, 7, 8.
SHERIFF'S BOND.

1. Debt by the State, on the relation of the Board of County Commissioners, &c., on the official bond of a county agent, against *Polke* and *Vanpelt*. Plea, that the bond was executed by the agent, with *Polke*, *Evans* and *Burnside*, sureties, and was delivered to the Board of County Commissioners; that afterwards the Commissioners, while the bond was under their control, caused the name of *Evans* to be erased from the same, and that of *Vanpelt* added thereto, without the knowledge or consent of *Polke* or *Burnside*. Held, that the plea was good.—*The State v. Polke et al.*.....27
2. If after the execution of a bond by several persons, it be altered by inserting in the body of it the names of others as co-obligors, and by adding their signatures to it, and the circumstances under which the alteration was made be not ex-

plained by the obligee, the bond will be considered void as to the first obligors.—*Harper et al. v. The State*.....61

3. A suit on the bond against all the obligors can not, in such case, be sustained.....*Ibid.*
4. A bond to indemnify an officer against a lawful or an apparently lawful act is valid. *Aliter*, if the act be unlawful.—*Anderson v. Farns*.....343
5. Whether a bond sued on was delivered as an escrow, and whether an alteration made in it after its delivery destroyed its identity, &c., are questions for the jury; and to enable the jury to determine those questions, they should have the bond before them.—*The State v. Boddy et al.*.....355
6. An alteration in a bond or deed made after its execution, in a material part, without the consent of the parties, vitiates the instrument; but if the alteration were made with consent of parties, the instrument is valid.—*The Richmond M. Company v. Davis*.....412
7. Whether blanks left in a bond when it was signed and sealed, and which were afterwards filled up, had been filled up with the obligor's consent, is a question for the jury.....*Ibid.*
8. One of the counts on a title-bond, setting forth the condition and assigning breaches, was barred by a valid plea. The other count was on the penal part of the bond only; and a plea thereto (*oyer* having been obtained of the condition) was correctly overruled on demurrer, but no breaches were suggested. Held, that damages could not be assessed for the plaintiff on either count.—*Brown et al. v. Hart*.....429
9. A bond conditioned to indemnify the obligee and save him harmless from the operation of certain judgments, which were liens on land purchased by him, is a bond of indemnity against damages arising from the judgments.—*Loyd et al. v. Marvin et al.*.....464
10. In debt on the penal part of such bond, a plea (*oyer* of the condition having been given) of *non damnificatus* generally is good.....*Ibid.*
11. A replication to the plea in such case that executions were issued on the judgments and levied on the land, and that the rents and profits thereof for seven years were offered

- for sale, does not show a breach of the condition of the bond, and is, therefore, insufficient.....*Ibid.*
12. Suit on a bond. Plea, payment. *Held*, that the plaintiff, to rebut the presumption of payment from lapse of time, might prove that, pending the suit, the defendant proposed to the plaintiff's attorney to pay the bond in property.—*Smith v. Buskirk*.....477
13. A written promise of indemnity, whether under seal or not, is, under the statute, assignable.—*Fletcher et al. v. Piatt*.....522
14. Signature is not essential to the validity of an appeal-bond.—*Parks v. Hazlerigg et al.*.....536
15. On the execution of a writ of inquiry in debt on a sheriff's bond, after a demurrer to the replication assigning breaches has been overruled, the *quantum* of the relator's damages caused by the breaches is the only subject of inquiry.—*Clark et al. v. The State*.....570

C

CAPIAS AD RESPONDENDUM.

See TRESPASS, 3.

CAPTION.

See CRIMINAL LAW, 6. INDICTMENT, 17, 25, 27.

CARRIERS.

A common carrier, or a private person who undertakes for hire to carry and deliver goods safely, is bound to pursue the usual and ordinary route. If he unnecessarily deviate from that route, he will be liable for any injury to the goods which may be thereby occasioned.—*Powers v. Davenport*.....497

CASE.

See CRIMINAL CONVERSATION, 1. TRESPASS, 11.

CHALLENGE.

1. A petit juror being challenged, stated on oath that he did not know but that he had formed an opinion in the case from rumour; but that he thought his opinion would readily yield to the evidence, if it should differ from the rumour he had heard. *Held*, that the challenge was not sustained.—*Van Vactor v. McKillip*.....578

2. The defendant's right, in the case of an indictment, to challenge a juror peremptorily, remains open until the juror is sworn.—*Munly v. The State*. 593
3. Same point.—*Morris v. The State*.....607

CHANCERY.

See EVIDENCE, 13. MORTGAGE, 9. PROMISSORY NOTES, 7. SHERIFF'S SALE, 6. SUBSTITUTION. SUPREME COURT. USURY, 5, 6. VENDOR AND PURCHASER, 5, 13, 33, 34.

1. A bill in chancery to enjoin a judgment at law can not be sustained, unless there be a release of errors indorsed on the bill.—*Addleman v. Mormon*.....31
2. A bill of review containing no equity on its face must, on final hearing, be dismissed.—*Gullett et al. v. Housh*.....52
3. A bill of review can be brought only in two cases: one, for error in the record; the other, on account of new matter discovered since the decree, or, at least, since the publication of the testimony.....*Ibid.*
4. A defendant to a bill in equity, having negligently suffered a decree to go against him by default, can not allege his own negligence in support of a bill of review.....*Ibid.*
5. If a defendant in equity knew of certain facts necessary to his defense before the rendition of a decree against him, he can not support a bill of review by alleging that he has, since the decree, discovered certain evidence of those facts, without showing that he could not prove them by other testimony.....*Ibid.*
6. The statute of limitations may be relied on in bar of a bill of review. *Ibid.*
7. The statute of limitations may be pleaded to a suit in equity, if the subject-matter of the suit be cognizable at law as well as in equity.—*Smith v. Calloway*.....86
8. But in those cases of trusts which are exclusively within the jurisdiction of a Court of chancery, the statute of limitations can not be pleaded. *Ibid.*
9. An administrator is a trustee for a person entitled to a distributive share of the estate; and the trust, in such case, is exclusively within the jurisdiction of a Court of chancery.....*Ibid.*
10. To a suit in chancery, therefore, by a person entitled to such share.

- against an administrator, the statute of limitations can not be pleaded. *Ibid.*
11. If the husband of an administratrix act in the administration of the estate, as he may do, a trust is raised in him which is exclusively within the jurisdiction of a Court of equity. *Ibid.*
12. Although the statute of limitations can not be pleaded to a suit in chancery against an administrator for a distributive share of the estate, length of time may be relied on as presumptive evidence of payment. *Ibid.*
13. The assignee of a note can not resort to a Court of chancery for relief against the assignor on account of the maker's insolvency, if there be no fraud in the assignment.—*Clark v. Spears et al.*.....96
14. If an answer in chancery be put in issue by a replication, no part of the answer can be read by the defendant as evidence in his favour, except so much as may qualify or explain the meaning of some passage in the answer read in evidence by the complainant. *Ibid.*
15. A bill of foreclosure and for a sale of mortgaged premises averred that the mortgage was given to secure the payment of a certain promissory note. The answer admitted the execution of the note and mortgage, but alleged that judgment had been obtained on the note, and that the defendant had paid the judgment. A general replication was filed. *Held*, that the admission in the answer of the execution of the note and mortgage was evidence against the defendant, but that the subsequent allegation of payment being a new and distinct fact, was not evidence in his favour. *Ibid.*
16. If an allegation in a bill in chancery be denied by the answer, the allegation must be proved by two witnesses, or by one witness and corroborating circumstances.—*Pierce v. Gates*.....162
17. If a distinct fact in avoidance be set up by an answer in chancery, such fact must be proved. *Ibid.*
18. When a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement or motive to the act of the other party, and by which an undue advantage is taken of him, is regarded as a fraud against which equity will relieve.—*Shaeffer v. Slade et al.*.....178
19. Courts of equity do not generally view time as being of the essence of a contract, unless it appear from the terms of the contract or the conduct of the parties that it was the design of the parties to render it essential. *Brumfield et al. v. Palmer*.....227
20. If a defendant in chancery die before he has answered, the suit can only be revived by a bill of revivor; but if he die after answer filed, the suit may be revived by virtue of the statute, on motion of the complainant, without such bill.—*Aldridge v. Dunn et al.*.....249
21. If a defendant in chancery submit the cause on bill, answer, and depositions, the filing of a replication is waived.—*Bunts v. Cole et al.*.....265
22. A bill in equity alleging a certain contract, which is denied by the answer, is not sustained by proof of a different contract.—*Kinsey v. Grimes*.
290
23. A bill of review, on account of newly discovered evidence, can not be sustained, if, by the use of reasonably active diligence, the evidence might have been known to the complainant before the trial of the first cause.—*Jenkins v. Prewitt*.....329
24. Courts of equity will follow the law in the construction of the statute of usury.—*Conner et al. v. Myers*.337
25. But on bill filed to be relieved against an usurious contract, the complainant will be required to pay the defendant what is *bona fide* due to him, deducting the usurious interest. *Ibid.*
26. The bill must show that such payment has been made, or it must contain an offer to make it. *Ibid.*
27. When a borrower has paid the money upon an usurious contract, a Court of equity will assist him to recover back the excess paid beyond principal and lawful interest. *Ibid.*
28. A suit in chancery was ready for final hearing, under the act of 1838, as soon as the issue was completed, unless depositions were to be taken.—*Ryhn et ux. v. Cochran*.....417
29. A bill in chancery showing that the complainant has no equity, may be objected to at any stage of the proceedings.—*Muir v. Clark*.....423
30. If a bill in equity be taken as con-

fessed on account of the non-appearance of the defendant, and a final decree be rendered against him, the record should show that the Court had jurisdiction of the person of the defendant.—*Shipley et al. v. Mitchell*. 472

31. When such bill was filed in vacation against a non-resident defendant, it was necessary, under the act of 1838, to give notice of the pendency of the suit, in a public newspaper, for three full weeks and sixty days before the next term of the Court.....*Ibid*.

32. A complainant in chancery moved the Court to dismiss the bill "without prejudice;" the Court refused so to dismiss the bill, but dismissed it "with prejudice." *Held*, that the dismissal would be no bar to another suit for the same cause. *Held*, also, that a writ of error would not lie on the dismissal.—*Vaneman v. Fairbrother et al*.....541

33. *Held*, that a bill in chancery filed by the obligee of a title-bond in possession of the premises, to enjoin an action of ejectment brought on the demise of the obligor's grantee, should allege that possession of the premises had been demanded of the complainant before the action of ejectment was brought. *Held*, also, (as the complainant was to have the title when he paid the purchase-money), that the bill should aver that the purchase-money had been paid.—*Newhouse et al. v. Hill*.....584

34. The obligee of such bond mortgaged it to A, and the latter afterwards obtained the legal title to the premises from the obligor, and gave up the bond to him. *Held*, that a bill filed by the mortgagor against the mortgagee and obligor, to set aside that transaction between the defendants, could not be sustained; the transaction not being of any injury to the complainant.....*Ibid*.

35. A prayer in such bill that the mortgagee be decreed to file a bill of foreclosure against the complainant, is mere surplusage.....*Ibid*.

CHARACTER.

See SLANDER, 3.

CIRCUIT COURT.

See BILLS OF EXCHANGE, 8. JURISDICTION, 2. SCIRE FACIAS, 10.

1. An entry on the record of the Cir-

cuit Court of a decision of the Supreme Court, in a case taken by appeal from the Circuit Court, is necessary before the last-named Court can act in the cause remanded from the Supreme Court.—*Glover v. Foote*.....293

2. Where a cause has been tried by the Court instead of a jury, the record should show that the cause was submitted to the Court by the parties.—*Mahan et al. v. Sherman*.....378

3. The Supreme Court will not interfere with the finding of the Circuit Court on a question of fact submitted to it, if the testimony be conflicting.—*The Richmond M. Company v. Davis*.....412

4. Where a cause is submitted to the Circuit Court, the judgment will not be reversed on account of an apparent contradiction in the statements of a witness.—*Conwell v. Buchanan*. 537

CONCEALED WEAPONS.

If a person, not being a traveler, carry a pistol concealed about his person, he is guilty of an indictable offense. His motive for carrying the pistol is immaterial.—*Walls v. The State*. 572

CONSENT.

See BOND, 6. INDICTMENT, 9.

CONSIDERATION.

To maintain an action of assumpsit, it must be shown that the consideration for the promise moved from the plaintiff.—*Farlow v. Kemp*.....544

CONSTABLE.

See TRESPASS, 8.

1. A constable having in his hands a *fi. fa.*, issued under the statute of 1842, may, on finding no goods on which to levy, return the execution before the return-day.—*Middlewood v. Nevitt*51
2. A constable's bond, though not executed until after he had commenced the discharge of his duties, may be sued on for any breach of the condition committed subsequently to its execution.—*Dickens et al. v. The State*358

CONSTITUTIONAL LAW.

See INDICTMENT, 18. JURISDICTION, 2. JUSTICE OF THE PEACE, 5.

MORTGAGE, 4, 13. STATUTES, 2.
USURY, 7, 9.

1. The statute of 1842, applying certain funds to purposes of education, is constitutional.—*The State v. Boyles*.90
2. Debt by the State on a judgment of the *Owen* Circuit Court obtained on a forfeited recognizance; the declaration not showing whether the recognizance had been taken in a civil or criminal case. *Held*, that a plea that the debt had been remitted by the Governor must show that the forfeiture had been incurred in proceedings arising out of a violation of the penal laws.—*The State v. Leak et al.*.....462

CONTINUANCE.

See ERROR.

1. An amendment of the declaration not affecting the merits, and which could not prejudice the defendant in his defense, is no cause for a continuance.—*McKinney v. Harter*.....385
2. A motion to continue the cause in order to procure the testimony of an interested witness, may be overruled.—*Jacobs v. Finkel*.....432
3. In trespass against *A, B, and C*, the two former appeared to the action, and the writ was returned "not found" as to *C*. *Held*, that the plaintiff was entitled to a continuance in order that process might be served on *C*.—*Sutton v. Hays*.....543

CONTRACT.

See RESTRAINT OF TRADE.

1. One party to an executed contract can not rescind it without restoring the other party to his original situation.—*Buell v. Tate*.....55
2. Applications to a Court of chancery for the exercise of its jurisdiction to rescind a contract are addressed to the sound discretion of the Court; but such discretion must be exercised in conformity with established principles.—*Shaeffer v. Sleade et al.* 178
3. A contract will not, in general, be rescinded when the contracting parties can not be placed in the identical situation which they occupied when the contract was made. And even when they can be so placed, the contract will not be rescinded if the application to rescind be not made within a reasonable time.*Ibid.*

4. If by an agreement between two persons, one agrees to furnish a specified sum of money to carry on a certain business of the parties, and afterwards fails to furnish the money, he is liable to the other at law for such breach of contract.—*Ellison v. Chapman*.....224
5. The fact that the obligee of a bond conditioned for the conveyance of real estate, retains possession of the premises, destroys his right to rescind the contract on the ground of the obligor's non-performance on his part.—*Brumfield et al. v. Palmer*.227
6. A party having a right to rescind a contract must exercise the right within a reasonable time.—*Johnson v. McLane*.....501
7. Where one party to a special entire contract has not complied with its terms, but professing to act under it, has done for, or delivered to the other party something of value to him which he has accepted, no action will lie on that contract for the work done or thing delivered; but the party who has been thus benefited by the labour or property of the other, will be responsible on an implied promise, arising from the circumstances, to the extent of the value received by him.—*Lomax v. Bailey*.....599

CONVEYANCE.

See FRAUDULENT CONVEYANCE. HUSBAND AND WIFE, 1, 5, 6. INFANTS.

1. A conveyance of land, certified to be acknowledged before a notary public of one county, "under his hand and seal," may be admitted to record in another county in which the land lies.—*Doe d. Gardner v. Vandewater*.....6
2. Such conveyance, if recorded, may be proved by the record book, when the person offering the evidence is not a party to the conveyance, and has not the control of it.....*Ibid.*
3. Ejectment by the lessee of *B. T.*, a mortgagee in fee, against the mortgagor. The defendant, to prove the title out of the lessor, introduced the following deed: "Know all men by these presents that I, *B. T.*, of, &c., for and in consideration of the sum of \$1,200 to me secured, have granted, bargained, sold, assigned, and transferred, and do, by these presents, grant, bargain, sell, assign, and transfer to *J. G.* and *S. M.* all

- my right, claim, and interest, in and to a certain mortgage and the premises therein described, made and executed to me by *J. L. G. on, &c.*, to secure to me the payment of \$1,400, with interest, &c. And I hereby authorize and empower the said *J. G.* and *S. M.* to prosecute in my name all suits now commenced by me, or to begin and prosecute to final judgment any and all suits, in my name, which they may deem necessary in and about the collection of the \$1,400, and the interest thereon accrued, or which may hereafter accrue, (they being responsible for all costs, expenses, &c.); and they, said *J. G.* and *S. M.*, are hereby fully authorized and empowered to order, direct and control the said mortgage, and the collection of the money thereby secured, (in my name, and for their use and benefit), to all intents and purposes, as fully and amply as I might and could do myself, and to receive and receipt for the same, hereby ratifying and confirming whatsoever the said *J. G.* and *S. M.* shall and may lawfully do in the premises. Witness my hand and seal this first of March, 1841.—*B. T.* (SEAL.)” It appeared that when this deed was executed, notes were given for the purchase-money, and that the mortgage referred to in said deed was the same with the mortgage relied on by the plaintiff. *Held*, that this instrument was a deed of bargain and sale of the mortgaged premises which passed the use to the bargainees, and that the statute of uses transferred to them the possession. *Held*, also, that said deed authorized the bargainees to collect the mortgage-debt for their own use, in the name of the bargainor.—*Givan v. Doe d. Tout*210
4. The *English* statute requiring deeds of bargain and sale to be enrolled is not in force in this State.....*Ibid.*
5. Such deeds, under our statute, are valid between the parties without being acknowledged or recorded. *Ibid.*
6. A voluntary conveyance of real estate can not be impeached by proof of the verbal or written declarations of the grantor made subsequently to its execution.—*Paine et al. v. Doe d. Griffin*.....485
7. Such conveyance, if made *bona fide*,

- is valid against a subsequent purchaser with notice.....*Ibid.*
8. That a person was deeply involved in debt when he executed a voluntary conveyance of land, is strong evidence that the conveyance was made to defraud subsequent purchasers*Ibid.*
9. A voluntary conveyance of real estate is not void as to subsequent creditors merely because the grantor was indebted \$25.00 or \$30.00 at the date of the deed.—*Doe d. Abbott v. Hurd et al.*.....510
10. After such conveyance, the grantor contracted a debt for which judgment was obtained before the conveyance was recorded. Subsequently to recording the conveyance, (which was not recorded in time), the land was sold under an execution on said judgment. *Held*, that the purchaser having notice by the record of the prior deed, took nothing by his purchase*Ibid.*
11. Under the statute, a *bona fide* conveyance of real estate, whether for a consideration or not, passes, *prima facie*, the grantor's interest in the premises, and the possession thereof, to the grantee.....*Ibid.*

CORPORATION.

- There is no corporation named “Congressional township numbered 11 north, of range numbered 7 west.”—*The State v. Anderson et al.*.....222

COSTS.

- See SECURITY FOR COSTS. TROVER, 1.
1. When a person accused of a crime before a justice of the peace is recognized to appear in the Circuit Court, and is convicted in that Court, the costs of the examination before the justice should not be included in the judgment.—*The State v. Thurston et al.*.....148
2. In a suit by the State, on the relation of a county treasurer, on a collector's bond, the relator is not liable for costs.—*The State v. Lahue et al.* 604

COUNTY TREASURER.

See COSTS, 2. TREASURER.

COVENANT.

- Covenant. The declaration alleged that by an agreement of the parties under seal, the defendant had let to

the plaintiff a distillery for a year and was to furnish sufficient meal to keep it running; that the plaintiff was to deliver to the defendant a certain quantity of whisky at the distillery for every sixty pounds of meal so delivered; that the defendant was to furnish barrels to hold the whisky; that if the defendant failed, at any time, to furnish meal as aforesaid, the plaintiff might furnish the distillery himself, and have the same rent free, till the defendant should again furnish meal; that if the plaintiff, at any time, failed to pay for the meal as fast as it was delivered or distilled, the agreement should be void; and that the defendant should give the plaintiff ten days' notice of his intention to stop furnishing the meal. Breach, that the defendant had failed to furnish the meal without giving the ten days' notice, &c. Plea, that the defendant had kept his covenants, until the plaintiff's non-performance as thereafter mentioned, and had furnished the plaintiff with sufficient meal to keep the distillery running, and barrels to hold the whisky; yet the plaintiff had afterwards failed to pay, &c., by delivering the whisky, &c., whereby the agreement became void. *Held*, that the declaration and plea were both good.—*Wood v. Powell et al.*.....517

CRIMINAL CONVERSATION.

1. Case lies for criminal conversation with the plaintiff's wife.—*Van Vatter v. McKillip*.....578
2. In a suit for crim. con., evidence that the plaintiff is ill-tempered, and that previously to the illicit intercourse charged he and his wife lived unhappily, and occasionally came to blows, is inadmissible in mitigation of damages.....*Ibid.*

CRIMINAL LAW.

1. If on an indictment against two persons one of them be tried separately, the record, by showing that the prisoner was separately tried, necessarily shows that the Court directed the trial.—*Dias v. The State*.....20
2. If the record of a criminal case show that, in the course of the trial, the Court had, on an adjournment from one day till the next, placed

the jury in the charge of a bailiff, it will be presumed that the jury was committed to his care in a legal manner, whatever that may be.*Ibid.*

3. A person indicted for an offense created by statute, can not be convicted after a repeal of the statute, unless the repealing statute contain a saving clause, &c.—*Taylor v. The State*.....93
4. A person indicted for an assault and battery with intent to murder may be found guilty of a simple assault and battery.—*The State v. Kennedy*. 233
5. In a criminal cause taken by a change of venue from one Circuit Court to another, the record on a writ of error must show, not only that the Court before which the indictment was found, but also that the Court which tried the cause, had jurisdiction of the offense.—*Doty v. The State*.....427
6. The jurisdiction of the Court that tried the cause can be shown only by a statement, in the nature of a caption to its proceedings, that the indictment was filed there, and that the prisoner was tried upon it..*Ibid.*
7. The indictment should also constitute a part of the record of the last-mentioned Court.....*Ibid.*
8. The Court, on the trial of such cause, instructed the jury as follows: "If the defendant has omitted to avail himself of evidence within his reach, by which he might have repelled that which was offered to his prejudice, his omission to do so supplies a strong presumption that the charge is well founded." *Held*, that the instruction was erroneous.....*Ibid.*

D

DAMAGES.

- See BILLS OF EXCHANGE, 8. BOND, 15. INTERNAL IMPROVEMENTS. JUSTICE OF THE PEACE, 4. REPLEVIN, 3, 4, 6. SLANDER, 5, 6, 11.
- If a constable fail to levy an execution on goods which might have been levied on, the value of the goods, with interest and ten *per cent.*, is, in a suit for such failure, the measure of the plaintiff's damages.—*Limpus v. The State*.....43

DEATH.

See EVIDENCE, 1, 2.

DEBT.

1. Debt on a writing obligatory, by which the defendant, for value received, promised to pay the plaintiff \$162.75, with interest from the date, to be paid on or before the session of the commissioners' Court of *Grant* county then next ensuing, provided that if the defendant proved to the satisfaction of said board that he had paid the plaintiff said money on an order given by said commissioners, at, &c., to one *Webster*, and by him assigned to the plaintiff, then the obligation to be void, or so much thereof to be void as the defendant should prove had been paid on said order over and above the credits indorsed on it. *Held*, that debt was the proper form of action.—*Massey v. Chance*160
2. If in debt payment of the whole be pleaded, and issue be joined on the plea, the whole, and not a part, of the issue should be tried.—*The State v. Leak et al.*.....462

DECEDENT'S REAL ESTATE,
EXECUTION AGAINST.

- A creditor of an intestate filed a petition in the Circuit Court, at the *September* term, 1842, to subject to execution certain lands of the deceased on a judgment against the administrators, recovered by the petitioner at the *March* term, 1842; there being no personal property to satisfy the judgment. The administrators pleaded, that, having ascertained that the personal property of the deceased was not sufficient to pay his debts, they had procured a decree of the Probate Court, at its *November* term, 1841, to sell the lands, or enough of them to pay the debts, at a price not less than their appraised value, on certain credits; and that they had used their utmost exertions to make sale of the lands, but without effect, for want of buyers. *Held*, on demurrer, that the plea was insufficient.—*Brownfield v. Vail et al.*.....203

DECREE.

See REPLEVY.

- A decree in chancery, however erroneous the proceedings may be, is not a nullity, if the Court had jurisdiction of the subject-matter and of the parties.—*Jackson d. Gordy v. Green et al.*.....391

DEDICATION.

See HIGHWAY, 2.

DEED.

See CONVEYANCE. FRAUDULENT CONVEYANCE. HUSBAND AND WIFE, 1, 5, 6. INFANTS.

DEFAULT.

Suit by notice and motion, under the act of 1838, against a sheriff for not returning an execution. Judgment by default, damages assessed by a jury, and final judgment for the plaintiff. In the judgment the Court stated that it appeared to their satisfaction that notice of the motion had been served on the defendant ten days, &c. *Held*, that there was no error in the proceedings.—*Dixon v. Boyer*547

DELIVERY-BOND.

1. Debt on a delivery-bond. Plea, that the bond was without consideration, in this: That, on, &c., a *fi. fa.* issued on a judgment in favour of the plaintiff against *A*, one of the defendants, and was, by *A's* consent, levied on certain land (here described), which was appraised under the statute of 1841, and which was more than sufficient, if sold at half its appraised value, to pay said judgment and all costs; that the sheriff, without selling the land or disposing of the levy, levied said execution on the goods named in the delivery-bond, and was about to sell the same without first selling the land, whereupon the defendants, to prevent the sale, gave the bond. *Held*, that the plea was valid.—*Miller et al. v. Ashton et al.*.....29
2. Debt on a delivery-bond, the condition reciting the *fi. fa.*, but not the judgment. Pleas—1, No consideration. 2, The bond was obtained by fraud, covin, and misrepresentation. 3, Payment of the judgment before the execution issued. *Held*, on general demurrer, that the pleas were good.—*Atkinson et al. v. Starbuck*420

DEMAND.

See AGREEMENT, 1. CHANCERY, 33. COVENANT. DOWER, 1. MORTGAGE, 3. PLEADING, 3. PROMISSORY NOTES, 38. SCHOOL-COMMIS-

SIONER, 9. VENDOR AND PURCHASER, 6, 28.

DEPOSITIONS.

If the defendant give notice that he will take depositions in another State, before a certain justice, at a specified time and place, and the plaintiff give notice that he will also take depositions before the same justice, at the same time and place, and both parties attend and take depositions accordingly, without objection, the defendant can not afterwards object in Court that the notice to him was insufficient; nor is the want of a *dedimus*, in such case, on the plaintiff's part, an objection to his depositions.—*The President, &c., of Connersville v. Wadleigh*.....102

DEVISE.

1. It was not necessary, under the act of 1831, to the validity of a will, that it should be recorded in the recorder's office.—*Ryhn et ux. v. Cochran*. 417
2. The word heirs is not necessary in a will of real estate, as it is in a deed, to convey the fee; but still, to give a fee, something more than the mere devise of the land is necessary.—*Doe d. Franklin et al. v. Harter et al.*...488
3. In a devise of land to A, the devisee was required, in consideration of the gift, to support his mother and the testator during their lives, and to pay the funeral expenses, "out of the proceeds of the farm on said land." *Held*, that the charge did not enlarge the devise to a fee by implication.....*Ibid.*
4. The charge can not produce that effect unless the devisee may, by paying it, possibly sustain a loss unless he takes a fee.....*Ibid.*
5. The introductory clause in a will was, "As to such wordly estate as it has pleased God to intrust me with, I dispose of the same in the following manner," &c. The will also contained this clause: "And to effectuate this my intention, I bequeath, &c.; and I also will and bequeath that P. F., my son, shall have the eighty acres of land whereon I now live," &c. *Held*, that P. F. took an estate in fee.....*Ibid.*

DILIGENCE.

See PROMISSORY NOTES, 9, 15, 16, 18, 19, 20, 27, 34, 35.

DISCHARGE OF JURY.

See INDICTMENT, 18.

DISTRESS.

See LANDLORD AND TENANT, 4, 7, 8, 9.

DOWER.

1. It was necessary, under the statute of 1838, that a petition to the Probate Court for the appointment of commissioners to assign dower, &c., should aver that, previously to its being filed, a demand on the defendant for an assignment of the dower had been made, or show good reason why such demand had not been made.—*Spinning v. Rowland*.....7
2. A widow can not mortgage her dower until it has been assigned to her.—*Strong et al. v. Bragg et al.*...62
3. In a suit in chancery for dower, it must appear that the complainant's husband was seised of the premises at some time during the coverture, or she can not recover.—*Dennis v. Dennis*.....572

E

EJECTMENT.

See MESNE PROFITS.

1. To sustain an ejectment, it must appear that the defendant was in possession of the premises when the action was commenced.—*Williamson v. Doe d. Crawford*.....12
2. The copy of a declaration in ejectment, with a notice requiring an appearance at the term next after that which followed the time when the notice issued was served on the tenant in possession. *Held*, that the notice was illegal.—*Jackson v. Goodtitle d. Bromley*.....129
3. Judgment in such action can not be rendered against the casual ejector until after the tenant in possession has made default.....*Ibid.*
4. In ejectment against a trespasser, notice to quit need not be proved.—*Meeker v. Doe d. Place*.....169
5. The declaration in such action may be amended, as to the date of the demise, at any time before verdict, provided the amendment do not injure or impose any hardship on the defendant.....*Ibid.*
6. In ejectment for an entire tract of land, any undivided portion of it may be recovered.—*Doe d. Moor et ux. v. Abernathy*.....442

ELISOR.

The Circuit Court may appoint an elisor in a cause in which the sheriff is a party, there being no coroner in attendance; and a person, though he have served under the sheriff as bailiff to the petit jury in other causes, may be appointed such elisor.—*The State v. Bodly et al.*.....355

EQUITY.

See CHANCERY.

ERROR.

The refusal to continue a cause on account of the absence of a witness, if the continuance be applied for on a sufficient affidavit, is error.—*Bradbury v. Dougherty*.....467

EVIDENCE.

See BILLS OF EXCHANGE, 2, 5. CHANCERY, 14, 15, 16, 17. CONVEYANCE, 2, 6. LANDLORD AND TENANT, 5. MALICIOUS PROSECUTION, 3. PARTNERS, 2, 3, 4. PLEADING, 22. PRACTICE, 9. PROMISSORY NOTES, 2, 4, 14, 22, 30, 33, 36. REPLEVIN, 6. SCHOOL COMMISSIONER, 2, 3, 6. SCIRE FACIAS, 3, 13. SET-OFF, 2. USURY, 3. WITNESS, 9, 12.

1. It is necessary to the admission of evidence of what a deceased witness swore to on a former trial, that it be proved by the record of that trial that the suit was between the same parties and for the same cause of action.—*Ephraims et al. v. Murdock*.
10

2. And the precise words of the deceased witness, and not merely the substance of them, must be proved.
Ibid.

3. If the goods on which an execution is levied be taken from the officer by a judgment in favour of the claimant, on a trial of the right of property, the judgment is conclusive, as to the right of that property, in a suit against the officer for a false return of the execution.—*Limpus v. The State*43

4. Suit against the maker of a sealed note for the payment of money, brought by V., as assignee of M., who was assignee of B., the payee. Plea of payment to the payee before notice of his assignment to M., claiming as set-offs certain notes of B., one of which was payable to the defendant, and the others were

assigned to him. Replication, that the defendant had notice, &c. *Held*, that the notes and assignments mentioned in the plea might be read in evidence by the defendant. *Held*, also, that evidence offered by the defendant that M. transferred the note declared on to W. by a blank indorsement, that W., without indorsing it, transferred it to T., that the latter transferred it by delivery to B., who in the same manner transferred it to the plaintiff, who, before the maturity of the note, filled up the blank indorsement to himself, was inadmissible under the issue.—*Vanvacter v. Patterson*.....94

5. On an indictment for selling spirituous liquors without license, the prosecutor need not prove that the defendant had no license.—*Shearer v. The State*.....99

6. Suit on a written promise by the defendant to assign to the plaintiff a note on a third person. *Held*, that parol evidence tending to show that the assignment was to be without recourse, was inadmissible.—*Blair et al. v. Williams*.....132

7. Debt on a promissory note. Pleas, fraud and failure of consideration. The defendant offered in evidence, on the trial, an advertisement by the plaintiff for the private sale of certain real estate, for a part of the price of which the note sued on had been given. The advertisement represented the land as containing a coal bank, &c., and had been inserted in a newspaper published in the county in which the land was situate. There was no proof of the publication of the advertisement except in *December*, 1838; and the purchase of the land was not made until *April*, 1840; nor did it appear that the advertisement had been ever seen by the defendant. *Held*, that the advertisement, under the circumstances, was inadmissible as evidence.—*Clawson et al. v. Lowry*.140

8. A party may introduce his evidence in the order he prefers, provided there is reason to suppose that the evidence offered is connected with the cause.....*Ibid.*

9. The subscribing witnesses to a deed are the proper persons to prove its execution, if they are within the jurisdiction of the Court and competent to testify.—*Sampson v. Grimes*.
176

10. In an action at law, evidence of the state of unsettled partnership accounts between the parties is inadmissible.—*Wilt v. Bird*.....258
11. An entry made by one of the parties to a suit, in an account book, can not be proved by parol without accounting for the absence of the book.....*Ibid.*
12. An offer, concession or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point.....*Ibid.*
13. An issue of fact having been formed on bill and answer in equity, a jury was called to try it, and the answer read in evidence. *Held*, that the jury might find for the complainant on the testimony of a single disinterested witness.—*Kinsey v. Grimes*.290
14. When the question in a suit in the Circuit Court is whether a judgment in another action had been reversed or not, the record of the Court that reversed the judgment, or an agreement of the parties that it had been reversed, is sufficient to prove the reversal.—*Glover v. Foote*.....293
15. A, an indorsee of a sealed note for the payment of \$1,000, indorsed it in blank to B, who, without indorsing the note, delivered it to C, and the latter sold it to D without indorsing it. D sued A as indorser—an indorsement in full to the plaintiff being written over the defendant's name. *Held*, that, supposing the plaintiff could only recover the amount the defendant had received from B for the note (of which, however, no opinion was given), still a statement made by B whilst he held the note that he had paid for it only \$650, could not be proved by the defendant; B himself being a competent witness in the cause.—*Lynn v. Jeter*.....300
16. Assumpsit for money paid by the plaintiff for the defendant's use, and at his request, on a writing obligatory for the payment of money, payable to one T. W., in which the defendant was principal, and the plaintiff his surety; and which the plaintiff had to pay. Plea, non-assumpsit without oath. *Held*, that the writing obligatory, not being the foundation of the suit, was not admissible as evidence without proof of its execution by the defendant.—*Jessup v. Gray*.....332
17. Suit on a note for the payment of money given for the right to make and sell fanning mills within certain limits. It appeared by the note and an article of agreement that the note was to be paid, provided the payee did not make or sell, within the prescribed limits, more than four such mills. *Held*, that, on the question whether the plaintiff had made or sold as aforesaid more than four such mills, the burthen of proof was on the defendant.—*Bowser et al. v. Bliss et al.*.....344
18. The transcript of a record of the District Court of the *United States*, for another State, is, if properly authenticated, admissible evidence in the Courts of this State.—*Redman et al. v. Gould*.....361
19. The contents of a paper can not be proved by secondary evidence, unless its loss or destruction be positively proved, or it appear that *bona fide* and diligent search had been made for it in vain, where it was likely to be found.—*Murray v. Buchanan*.....549
20. And, in general, the loss of the paper must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced, if he be living.....*Ibid.*
21. *Sci. fa.* on a justice's transcript, &c. *Held*, that the circumstance that the defendant was living on forty acres of land, claiming the same as his own, was *prima facie* evidence that the land was his.—*Shiel v. Ferriter*.....574
22. The admission of immaterial evidence (the merits of the cause having been fully tried) can not be assigned for error.—*Van Vacter v. McKillip*.578
23. On the trial of an indictment under the act against fraudulent voting, the defendant's statements made under oath at the polls, on being challenged, are not admissible evidence for him; nor is the decision of the judges of the election in favour of his right to vote any defense.—*Morris v. The State*.....607
24. In assumpsit against partners for goods sold and delivered, the plain-

tiff having proved that one of the defendants had examined his (the plaintiff's) books, containing the items of his account against the defendants, and had acknowledged them as they were stated in the books to be correct, offered to prove said items by parol evidence, without producing the books or accounting for their absence. *Held*, that the evidence was inadmissible.—*Thompson et al. v. Fry*.....608

EXCHANGE.

1. If two persons exchange horses, with the privilege to one of the parties to return, within a given time, the horse received by him in exchange, and such party fail within the time to return the horse so received, the contract becomes absolute.—*Johnson v. McLane*.....501
2. And a breach of warranty as to one of the horses will not, of itself, affect the validity of the exchange....*Ibid*.

EXECUTION.

See EXECUTORS AND ADMINISTRATORS, 7. JUSTICE OF THE PEACE, 1, 2, 11. TRESPASS, 7, 8.

1. A *fi. facias* on a justice's judgment which was replevied, issued at the request of the surety before the expiration of the replevy, without an affidavit, is under the statute of 1838, irregular and void.—*Ezra v. Manlove*.....389
2. If an execution so issued be levied by the constable, he may, when informed of the invalidity of the writ, abandon the levy.....*Ibid*.
3. Under the act of 1843, an execution-defendant may claim as exempt from execution, at any time before the sale, any personal property levied on, not exceeding in value \$125.—*Pate v. Swann et al*.....500
4. A *fi. facias* binds the goods of the debtor from the time it is delivered to the sheriff, though the latter fail to indorse on it the time of such delivery.—*Johnson v. McLane*...501
5. After *A* and *B* had exchanged horses, a *fi. fa.* against the former was delivered to the sheriff; and after such delivery, *A* and *B* re-exchanged the horses. The sheriff afterwards levied the execution on both horses as *A*'s property. *Held*, that such levy was not a relinquishment of the lien of the execution on the horse originally owned by *B*.*Ibid*.

6. If after the issuing of a *fi. fa.* by a justice of the peace, and before its execution, the plaintiff die, the writ may still be executed; and if the justice afterwards prevent its execution, he may, for any loss thereby caused to the estate of the deceased, be sued in case by the administrator of such estate.—*Murray v. Buchanan*.

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EXECUTORS AND ADMINISTRATORS.

See CHANCERY, 9, 10, 11, 12. EXECUTION, 6. MORTGAGE, 2. PLEADING, 25. PRINCIPAL AND SURETY, 2.

1. An action can not be brought against an administrator on a promise of the intestate, (the administrator not having been guilty of waste, negligence, or fraud), after a complaint had been filed in the Probate Court by the administrator, for the purpose of settling the estate as insolvent.—*Remy v. Butler*.....5
2. If the plaintiff confess the plea of *plene administravit*, a judgment in his favour should be of assets *quando acciderint*.—*Wilt v. Bird*.....258
3. Petition in the Probate Court against an administrator for payment of a judgment against his intestate, alleging waste, &c. The petition was filed in 1842, and before the expiration of a year from the time of the defendant's appointment as administrator. *Held*, that without evidence of waste the suit could not be sustained.—*Lewis v. Houston*.....335
4. The executor of a vendor of real estate (the vendor having died without making a deed, and before he was bound to convey) has the right, in a Court of equity, to require the heirs or devisees of the vendor to execute a deed according to the contract of sale, and to demand of the vendee payment of the purchase-money; and he is also entitled to enforce the vendor's lien for the price of the land.—*Hurst v. Hensley et al*.....373
5. The declaration in a suit against the administrator of the acceptor of a bill of exchange need not allege that the plaintiff's claim had been filed in the office of the clerk of the Probate Court.—*Phipps et al. v. Addison et al*.....375
6. In such suit, the judgment, if for the plaintiff, should be for the damages and costs to be levied of the

- intestate's goods, if the defendant have so much; and if he have not, then the costs of the defendant's own goods.....*Ibid.*
7. After a judgment had been obtained in the Probate Court against an administrator, and an execution awarded and issued against the real estate of the deceased, the administrator filed a complaint, under the statute, for the purpose of settling the estate as insolvent. *Held*, that, on motion of the administrator, the execution should be set aside. *Held*, also, that the lien of the judgment was destroyed by the filing of the complaint.—*Joyce et al. v. Hufford et al.* 382
8. The act of 1843, giving justices of the peace jurisdiction in actions by and against executors and administrators, applies to causes of action which existed at the time of its passage, as well as to those that might afterwards accrue.—*Thompson v. Harbison*.....495
9. If an administrator lend the money of the estate while there are debts to pay, without an order of the Probate Court, and the money be not repaid, he is guilty of waste.—*The State v. Johnson et al.*.....529
10. If a Probate Court revoke letters of administration, it must be presumed, till the contrary appear, that the same Court had granted them. *Ibid.*
11. For waste committed by an administrator, who has been removed from office, a suit (without a previous judgment against him) may be brought against him and his surety on the administration bond, on the relation of his successor.....*Ibid.*
12. If an administrator be sued for a debt of the intestate, and after the commencement of the suit his letters of administration be revoked, he may plead such revocation in bar of the further maintenance of the action.—*Morrison v. Cones*.....593
13. If such plea be filed before any continuance of the cause, the form, viz.: That the plaintiff ought not further, &c., because he (the defendant) says that since the commencement of the suit, &c., is proper.....*Ibid.*

F

FIXTURES.

A steam-engine erected in a perma-

nent manner in a tan-yard, to facilitate the process of tanning, and used there for such purpose for two or three years, but which could be removed without injury to the building with which it was connected by braces, was held to be a fixture, and to pass, by a mortgage of the land on which it was erected, to the mortgagee.—*Sparks et al. v. The State Bank*.....469

FOREIGN MERCHANDISE.

1. To authorize a person to sell foreign merchandise without license, he must have received it in exchange for articles of his manufacturing, or for products of his own agriculture.—*Colson v. The State*.....590
2. An indictment for selling foreign merchandise without license, for money, is not sustained by proof that the merchandise was sold for produce.....*Ibid.*

FORMER RECOVERY.

See PLEADING, 3. SCIRE FACIAS, 6. VARIANCE, 6, 7.

Suit against *A* on a promissory note. Plea, that the note was joint and several, purporting to be executed by the defendant and *B* and *C*; that the plaintiff had previously sued the defendant and the other makers in debt on the same promises; and that the defendant and *B* had recovered in the suit a judgment for costs. *Held*, that the plea was bad.—*Stingley v. Kirkpatrick*.....359

FORNICATION.

See INDICTMENT, 26.

FORT WAYNE.

The corporation of "The President and Trustees of the Town of Fort Wayne" is merged in the corporation of "The City of Fort Wayne;" a bond executed to the former corporation is transferred to and vested in the latter; and a suit on such bond should be brought in the name of "The City of Fort Wayne."—*The President, &c., of Fort Wayne v. Jackson et al.*.....36

FRAUD.

See CHANCERY, 18. PLEADING, 13. SALE OF GOODS. SHERIFF'S SALE, 4. VENDOR AND PURCHASER, 12, 33.

FRAUDS, STATUTE OF.

See BOND, 14. PLEADING, 12. VENDOR AND PURCHASER, 5, 35.

The statute of frauds does not require that an agreement for the sale of real estate should be signed by both parties. It is sufficient if it have the signature of the party sued.—*Shirley v. Shirley et al.*.....452

FRAUDULENT CONVEYANCE.

1. A purchaser of land at sheriff's sale, under a judgment against a person who had conveyed the land to defraud his creditors, stands in the place of a creditor of the fraudulent grantor, and has the same rights.—*Scott v. Purcell et al.*.....66
2. The statute against fraudulent conveyances renders the fraudulent deed void only as to creditors, leaving it valid as to the parties themselves, and as to a *bona fide* purchaser from the fraudulent grantee for a valuable consideration.....*Ibid.*
3. The title of such *bona fide* purchaser, acquired before a sheriff's sale of the land under a judgment against the fraudulent grantor, will be preferred to that of the purchaser at the sheriff's sale.....*Ibid.*
4. Land descending from the fraudulent grantee is subject, in the hands of his heir, to the claim of such purchaser at sheriff's sale.....*Ibid.*
5. A conveyance of real estate made to defraud creditors will, on their application, be set aside in chancery, if the grantee, before payment of the purchase-money, have notice of the fraud.—*Parkinson et al. v. Hanna.*
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G

GAMING.

See INDICTMENT, 20, 23.

GOODS, SALE OF.

See SALE OF GOODS.

GRAND JURORS.

1. The manner of selecting the grand jury is not a matter of which the Court can take cognizance on a motion to quash an indictment.—*The State v. Bolt*.....19
2. The illegal selection of the grand jurors is no cause for quashing an indictment on motion.—*The State v. Hensley*.....324

GUARANTEE.

1. A guarantee directed to Messrs. Y. and B. may be sued on by W. B., D. Y., and J. W. Y.; the declaration averring the promise to have been made to the plaintiffs by the name of Messrs. Y. and B.—*Jackson et al. v. Yandes et al.*.....526
2. In the case of a conclusive guarantee—not a mere overture to guarantee—notice of its acceptance is not necessary.....*Ibid.*
3. In a suit on a guarantee, whether the notice to the defendant of the principal debtor's non-payment was reasonable or not, is a question for the jury.....*Ibid.*

GUARDIAN AND WARD.

See HABEAS CORPUS, 1. PLEADING, 26, 27. PRINCIPAL AND SURETY, 1.
The Probate Court can not remove a guardian, except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given by him.—*Pickens v. Clayton* .. 321

H

HABEAS CORPUS.

1. A petition, which was sworn to, for a writ of *habeas corpus*, stated that the petitioner was the guardian, &c., of a certain infant; that the infant was the daughter of one A, deceased, and his wife *Abigail*, who had, after her said husband's death, married *Lorenzo D. Hovey*; that the infant was, by said *Lorenzo* and wife, illegally restrained of her liberty, and detained from the custody of the petitioner. The petition prayed that the writ be directed to said *Lorenzo* and wife, commanding them to have the infant before the Court, &c. The writ was granted accordingly. *Held*, that the facts stated in the petition (which were admitted by a demurrer to be true) were sufficient to authorize the issuing of the writ.—*Hovey et ux. v. Morris*.....559
2. When a *habeas corpus* issues on a complaint of illegal imprisonment, the judge who issues the writ may, if the authority by which the prisoner is detained be defective, call before him witnesses, inquire into the guilt of the prisoner, and remand, recognize, or discharge him,

- as he may think proper.—*The State v. Best et al.*.....611
3. The judge before whom a prisoner is brought by *habeas corpus* for the purpose of giving bail, may exercise his own discretion as to the amount of the penalty of the recognizance, without regard to the amount fixed by the magistrate who committed the prisoner.....*Ibid.*

HALF-BLOOD.

Brothers and sisters of the half-blood inherited, under the act of 1818, the estate of a deceased brother equally with brothers and sisters of the whole blood.—*Doe d. Moore et ux. v. Abernathy*.....442

HEIRS.

See MORTGAGE, 2.

HIGHWAY.

1. In opening a road established by the County Commissioners, the supervisor can not deviate from the course of the road so established.—*Phipps v. The State*.....512
2. No presumption of dedication of uncultivated land of the *United States* for a highway can be raised from the use of such land as a highway by the public*Ibid.*

HUSBAND AND WIFE.

1. A *feme covert* can not alien her real estate unless her husband join with her in the deed.—*Scott v. Purcell et al.*.....66
2. In assumpsit against husband and wife on a promissory note made by the wife *dum sola*, and non-assumpsit pleaded, the plaintiff must prove the marriage.—*Wallace et ux. v. Jones*.....321
3. A suit can not be sustained by husband and wife for a libel on them both.—*Hart v. Crow et ux.*.....351
4. In the case of such libel there should be two actions, one by the husband for the injury to him, and the other by husband and wife for the injury to the wife.....*Ibid.*
5. A conveyance of real estate executed and acknowledged by husband and wife, but in the body of which the wife's name is not inserted, does not convey the interest of the wife in the premises. —(*Cox et al. v. Wells*) 410
6. A husband can not convey land

immediately to his wife, but he may convey it to trustees for her use.—*Doe d. Abbott v. Hurd et al.*.....510

I

IMMATERIAL ISSUE.

See PRACTICE, 3. SCHOOL COMMISSIONER, 7.

INDEMNITY BOND.

See BOND, 4, 9, 10, 11, 13.

INDIANA UNIVERSITY.

Each county in the State has a right to send two students to the *Indiana University* to be instructed, free of tuition fees, in the law department as well as in the other departments of the institution.—*McDonald v. Hagins*525

INDICTMENT.

See MARRIAGE.

1. A count in an indictment for murder stated that the defendant made an assault on one *G. B.*, and that the defendant, with a certain axe &c., the said *G. B.*, in and upon the left side of the head, and over the left temple of him the said *G. B.*, then and there feloniously and wilfully, and of his malice aforethought, did strike and beat, giving to the said *G. B.* then and there, with the axe aforesaid, in and upon the right side of the head of him the said *G. B.*, and over the right temple of him the said *G. B.*, one mortal wound, &c., of which said mortal wound the said *G. B.*, &c., on, &c., died, and so the jurors aforesaid, upon their oath aforesaid, do say, &c. *Held*, that the count, in the description of the offense, was repugnant and inconsistent with itself in a material part, and was void.—*Dias v. The State*. 20
2. Such count must state the part of the body to which the violence was applied; but the proof need not correspond with the statement.....*Ibid.*
3. If an allegation in such count be sensible and consistent in the place where it occurs, and be not repugnant to antecedent matter, it can not be rejected as surplusage, although it be repugnant to a subsequent allegation*Ibid.*
4. An objection to such count for repugnancy in the description of the offense can not be removed by

- striking out the allegation which is inconsistent with a previous one, unless, after striking out the subsequent allegation, a legal description of the offense will still remain..*Ibid.*
5. In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe the depth or breadth of the wound.....*Ibid.*
 6. An indictment in such case concluded as follows: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said S. D., (the prisoner), in manner and form aforesaid, feloniously and willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute," &c. *Held*, that this conclusion was insufficient for not designating the person murdered*Ibid.*
 7. Although an indictment charge that the defendant feloniously and willfully, and of his malice aforethought, did strike the deceased, &c., giving him, &c., a mortal wound, &c., yet, if it do not contain the technical allegation that the defendant feloniously murdered the deceased, it is an indictment for manslaughter only, and not for murder—the word *murder* being a term of art which can not be supplied in an indictment by any other word*Ibid.*
 8. If an indictment for perjury show that the testimony alleged to be false was material to the issue, an express allegation that it was material is unnecessary.—*The State v. Hall*...25
 9. The indictment in such case alleged the perjury to have been committed on a trial before a justice and a jury of six men. The trial seemed to have been with consent of parties. *Held*, that the consent was a waiver of whatever irregularity there might have been as to the jury*Ibid.*
 10. If an indictment for perjury show that the false matter sworn to was material to the question before the Court, an express allegation of its materiality is unnecessary. — *The State v. Johnson*49
 11. If an indictment under the act of 1842, applying certain funds to purposes of education, be against a justice of the peace for not paying over fees, &c., on the first Monday of August of a certain year, it must aver that the fees were received by him prior to the first Monday of August of the preceding year.—*The State v. Boyles*.....90
 12. And if the indictment, under said statute, be against the justice for not making an affidavit that he had no fees, &c., it should aver that no such fees came to his hands, &c.....*Ibid.*
 13. An indictment for malicious trespass alleged that the defendant did "maliciously and mischievously injure, and cause to be injured, a certain house, the property of one William McMahon," situate, &c., "of the value of \$50.00, to the damage of said William McMahon \$5.00, contrary to the form of the statute," &c. *Held*, that the offense was insufficiently described. The indictment should have shown the specific injury done to the house.—*The State v. Aydelott*157
 14. An indictment for arson should allege the value of the property destroyed.—*Ritchey v. The State*..168
 15. It should also allege that the property burned or set on fire belonged to the person in actual possession in his own right.....*Ibid.*
 16. The joinder of counts for separate felonies in an indictment is a good cause for quashing the indictment on motion made before pleading to issue. But the refusal of the Court in such case, after plea, to compel the prosecuting attorney to elect on which count he will proceed, is not error.—*Weinzorpflin v. The State*.186
 17. A caption of an indictment which shows the indictment to have been found by a grand jury at a Circuit Court held, at, &c., on, &c., is sufficient. It need not specify the qualifications of the jurors, nor allege them to be good and lawful men. *Ibid.*
 18. If a person has been once put on his defense on a legal indictment, before a competent jury, and the jury has been unnecessarily discharged, such discharge is equivalent to an acquittal of the defendant.....*Ibid.*
 19. If the description of rape in an indictment leave out the word "unlawfully," but be in accordance with the common law definition of the offense, it is sufficient.....*Ibid.*
 20. An indictment against a person for suffering gaming in his grocery should give the names of the persons who played, or state their names to be unknown.—*Ball v. The State*.....242

21. Where one statute creates an offense and another directs the penalty, the indictment must conclude against the form of the statutes.—*The State v. Moses*.....244
22. In an indictment for an assault and battery, it is unnecessary to allege that the person beaten was in the peace of the State; nor are the words "force and arms" necessary in the description of the offense.—*The State v. Elliott*.....280
23. An indictment for gaming need not state the name of the game played.—*The State v. Ross*.....322
24. An indictment can not be sustained without proof that the offense was committed in the county where the venue is laid.—*Moody v. The State*. 424
25. The caption of an indictment may, by leave of the Court, be amended by the prosecuting attorney.....*Ibid*.
26. An indictment against an unmarried man for living in open and notorious fornication with a certain woman, need not aver that she is unmarried.—*The State v. Gooch*.468
27. In the caption of an indictment a certain year was named; but in the indictment itself, commencing with the words, "The grand jurors impaneled," &c., there was no notice of any year, except by the words, "in the year of our Lord aforesaid," &c. *Held*, that the indictment, therefore, (the caption being no part of it), was bad.—*The State v. Hopkins et al*.....494
28. If to a statute on which an indictment is founded there be an exception in a subsequent statute, the exception need not be negatived in the indictment.—*Colson v. The State*. 590
29. In an indictment for administering medicine to procure abortion, the name of the medicine need not be stated, nor need the medicine be described as noxious.—*The State v. Vawter*.....592

INFANTS.

1. A deed of bargain and sale of real estate, executed by an infant, for valuable consideration, is voidable, but not void.—*Doe d. Moore et ux. v. Abernathy*.....442
2. A female infant, residing in Pennsylvania, executed there a deed of bargain and sale for land situate in this State. She afterwards married,

but whether before or after her majority did not appear; nor did it appear where, after the execution of the deed, she and her husband had resided; nor that her husband had acquiesced in the deed after he knew of it. *Held*, that the lapse of about five years after the wife's majority, without any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it. *Ibid*.

3. An action of ejectment for premises conveyed by the lessor whilst an infant, commenced after his majority, and within a proper period, is a valid avoidance of the conveyance; but the grantee or tenant in possession must be notified of the intention to disaffirm before the commencement of the action.....*Ibid*.
4. Same point as that in *Clawson v. Doe d. Moore et ux.*, 5 Blackf., 300.—*Doe d. Berry v. Shaw*.....462

INJUNCTION.

See CHANCERY, 1. VENDOR AND PURCHASER, 1, 33.

INNUENDO.

See SLANDER, 10, 19, 20.

INQUIRY, WRIT OF.

See BILLS OF EXCHANGE, 8.

1. The declaration in assumpsit contained a count on a promissory note and a general count for goods sold and delivered. Judgment by default. *Held*, that a writ of inquiry was necessary.—*Starbuck v. Lazenby*. 268
2. If the declaration in assumpsit contain a count on a promissory note, and a common count, and the defendant appear to the suit and suffer judgment by *nil dicit*, the Court can not assess the damages without the consent of parties.—*Sherman v. Wilson*362

INSTRUCTIONS TO JURY.

1. If the Court charge the jury erroneously, but afterwards correct the mistake by giving a legal charge on the subject, there is no error.—*Gronour v. Daniels*.....108
2. A judgment shown to be right by the evidence in the record will not be reversed on account of any in-

- structions given to the jury.—*Hooker et al. v. The State*.....272
3. If a refusal of instructions to the jury would be right under any supposable state of facts, it can not be assigned for error.—*Kinsey v. Grimes*. 290
4. If evidence not material to the issue be introduced, the Court may instruct the jury to disregard it.—*Utter v. Vance*514

INTERNAL IMPROVEMENTS.

1. In estimating the amount of damages for land taken in constructing the Central canal, the value of the land *at the time it was taken*, and how much the complainant's land adjoining that taken had, *at the same time*, been increased in value by the location of the canal, should be taken into consideration.—*Vanblaricum v. The State*.....209
2. And, also, in ascertaining the amount of such damage, either party may show how the canal was progressing when the land was taken, and what appropriations of money had then been made for the completion of the canal.....*Ibid.*

J

JOINDER OF COUNTS.

See INDICTMENT, 16.

JOINT AND SEVERAL.

See FORMER RECOVERY. PRACTICE, 1, 2. SCIRE FACIAS, 15.

JUDGMENT.

See EXECUTORS AND ADMINISTRATORS, 2, 6. JUSTICE OF THE PEACE, 6. MORTGAGE, 10, 12. PRACTICE, 1, 2, 10.

1. In debt on a bond with a condition, the judgment for the plaintiff was for the penalty, and also for the damages assessed and costs. *Held*, that that part of the judgment which was for the damages assessed was erroneous.—*Armstrong et al. v. The State*.....81
2. A person can not sustain a *scire facias* to vacate a judgment which is regular on its face, and which he obtained at a term prior to that when the *scire facias* issued.—*Brackenridge v. McAlloch*.....334
3. A judgment *non obstante veredicto* is allowed only where the plea con-

fesses the action, and entirely fails to avoid it.—*Berry v. Borden*.....384

4. Indictment against A, B, and C, for failing to discharge their duty as county commissioners, &c. The defendants pleaded guilty, and a judgment was rendered against them, that they make their fine in a certain sum to the State. *Held*, that this judgment being joint, was erroneous.—*The State v. Hopkins et al.*494

JURISDICTION.

See EXECUTORS AND ADMINISTRATORS, 8. JUSTICE OF THE PEACE, 8, 9, 10. LANDLORD AND TENANT, 1, 3. SLANDER, 21.

1. The Supreme Court has no jurisdiction in any case commenced before a justice of the peace where the amount in controversy in the Supreme Court, exclusive of interest and costs, is less than \$20.00.—*Reed v. Sering et al.*.....135
2. An indictment for a capital offense can not be found in a Circuit Court in the absence of the president.—*Cook v. The State*.....165
3. A transitory action may be commenced against a single defendant in the Circuit Court of any county in which he may be found.—*Wynn v. Kiser*.....299

JURY.

See BOND, 5, 7. CHALLENGE. RECOGNIZANCE, 10.

1. Assumpsit for lumber sold and delivered. Pleas: Non-assumpsit and set-off. On the trial, the defendant introduced in evidence a bill of lumber made out by a carpenter who had built him a house. The Court permitted the jury to take this bill to their room, after charging them that they could not receive it as evidence, of itself, of the amount of lumber contained in the house, but that if a witness had testified to it as being the correct amount of lumber the house contained, they might refer to it as a memorandum of what his evidence was on that subject. *Held*, that, under the statute, there was no error in permitting the jury, with the instructions given, to take the bill.—*Waltz et al. v. Robertson*499
2. Whether the testimony of a witness is rendered suspicious by any of the facts proved, is a question not for

the Court, but for the jury.—*Van Vacter v. McKillip*.....578

JUSTICE OF THE PEACE.

See EXECUTORS AND ADMINISTRATORS, 8. INDICTMENT, 11, 12. LANDLORD AND TENANT, 1, 3. MARRIAGE. PLEADING, 3, 17. TRANSCRIPT. TRESPASS, 4.

1. An execution issued by a justice of the peace, reciting a judgment for \$102.36, without showing how much of the judgment was for the debt, and how much for interest thereon, was held not to be void.—*The State v. Westbrook et al.*.....138
2. It will be presumed that the justice, in rendering such judgment, was acting within his jurisdiction...*Ibid.*
3. A constable appointed by a justice of the peace to levy an execution on the goods of *A*, levied the same on the goods of *B*. A trial of the right of property was claimed by *B*, who gave bond, &c., but the constable refused to deliver the goods to *B*. Held, that, for this misconduct of the constable, the justice was liable to *B* in an action on the case.—*Dugan v. Melogue*.....144
4. The jury in such case may, though the constable tender the property to the plaintiff before suit brought, give the value of the property as the amount of the damages.....*Ibid.*
5. A justice of the peace has no authority, without special directions from the judgment-creditor, or person entitled to the judgment, to receive anything but gold or silver in payment of a judgment rendered by him.—*Hooker et al. v. The State*. 272
6. The judgment of a justice of the peace may, by statute, be so assigned as to authorize the assignee to be the relator in a suit on the justice's bond for the money collected by the justice on the judgment.....*Ibid.*
7. The Court of a justice of the peace is a Court of record.....*Ibid.*
8. To a suit on a promissory note commenced before a justice of the peace, a plea that the note was given in consideration that the payee would convey certain land to the defendant; that the payee had no title to the land; and that he had failed to make the deed, does not oust the justice of jurisdiction.—*Rogers v. Perdue*302
9. Debt before a justice of the peace on

a bond in the penalty of \$500. The plaintiff claimed \$50.00 in damages. Held, that the justice had jurisdiction.—*Anderson v. Farns*.....343

10. A justice of the peace is authorized to try and sentence a person accused of disturbing a lawful assembly.—*Henry v. Hamilton*.....506
11. An execution issued by a justice of the peace, reciting a judgment rendered by him for \$102, with interest and costs, was held to be valid.—*The State v. Burnside et al.* 577

JUSTIFICATION.

See TRESPASS, 1, 2, 3, 7.

If real estate exempt from taxation be assessed for taxes, the levying thereof by the collector can not be justified under the duplicate and precept.—*The State Bank v. Brackenridge*.395

L

LANDLORD AND TENANT.

1. The jurisdiction of the justices of the peace, under the act of 1838, concerning tenants holding over, is not limited as to the amount of damages.—*Ricketts v. Ash*.....274
2. That statute only authorizes proceedings for the recovery of the possession of real estate and damages for its detention. It has no relation to personal property.....*Ibid.*
3. *T.* filed a complaint before two justices of the peace against *D.* and *J.*, as tenants of certain premises, for holding over, &c. The damages claimed were \$100. Plea, not guilty. The following were the facts: The premises had been conveyed in fee simple by *D.* to *T.*; and, by a sealed instrument of the same date with the conveyance, executed by the plaintiff and defendants, the plaintiff, in consideration, &c., had "leased, rented, and to farm let," the premises to the defendants, from the date thereof until, &c., and had agreed to pay *D.* \$100 at the end of the term, "on the express condition" that the defendants should surrender the premises to him at or before that time, and had agreed also that should *D.*, on or before that time, pay him a certain debt, &c., he would permit *D.* to remain in possession, and would release to him all his interest in the premises; and the

defendants had agreed that they would use the premises in a husband-like manner, would commit no waste, and would, at the end of the term, deliver possession to the plaintiff if *D.*, in the meantime, should fail to pay him said debt. *Held*, that the claim of \$100 did not exceed the jurisdiction of the justices; and that the title to real estate was not involved in the cause. *Held*, also, that, to maintain the suit, it was not necessary that the plaintiff should have made an actual tender to *D.* of the \$100. *Held*, also, that the agreement between the plaintiff and defendants created between them the relation of lessor and lessees.—*Dougherty et al. v. Thompson*.

277

4. A tenant contracted to pay annually, for the rent of certain real estate, \$96.00 in *Indiana* scrip. *Held*, that the remedy by distress does not lie on such contract.—*Purcell v. Thomas et al.*.....306

5. By a lease of real estate executed by the lessor and lessee under their seals for one year, the time fixed for the payment of the last half year's rent was the first of February, 1841. *Held*, that parol evidence that the said rent was not due until the first of March, 1841, was inadmissible. *Held*, also, that the landlord in such case had a preference for said rent over an execution levied on the first of February, 1841, on the tenant's goods.—*Carpenter et al. v. Shanklin*.

308

6. The following writing signed by *A* was delivered by him to *B*: "Rec'd of *B* \$3.50 for the rent of my brick house in *Covington* for one month, with the privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843." *Held*, that this was a lease of the premises given upon an executed consideration by *A* to *B* for one month from the date, and from month to month for five months longer, if *B* should pay *A*, at the commencement of each month, \$3.50 for rent.—*Munson v. Wray*.....403

7. The goods of a stranger found on demised premises are liable to be distrained for rent, unless they be such as are specially exempted by the common law, or by the statute regulating distress for rent.—*Stevens v. Lodge*.....594

8. Goods were mortgaged by a tenant of real estate to a stranger, and were left in the former's possession on the premises by an agreement in the mortgage. *Held*, that the facts that the mortgage was recorded, and that the landlord had made no objection to the goods remaining on the premises, were no evidence that the goods were on the premises with the landlord's consent.....*Ibid.*

9. The landlord's claim on goods distrained on demised premises is not limited to one year's rent.....*Ibid.*

LEASE.

See LANDLORD AND TENANT, 6.

LIBEL.

See HUSBAND AND WIFE, 3, 4.

LICENSE.

See TRESPASS, 6, 12.

LIEN.

See EXECUTION, 4, 5. EXECUTORS AND ADMINISTRATORS, 7. VENDOR AND PURCHASER, 9, 14, 15, 16, 19, 20, 32.

1. A mechanic's lien for work done is not waived by taking his employer's note for the money due for the work, and giving a receipt in full for such money, the note not being paid.—*Goble v. Gale et al.*.....218

2. Where a mechanic gives credit for work done, notice of his intention to hold a lien may be filed in the recorder's office within sixty days from the time the credit expired.....*Ibid.*

3. The statute respecting the liens of mechanics and others on buildings embraces floating wharves for receiving, storing and forwarding merchandise.—*Olmsted et al. v. McNall et al.*.....387

4. The statute giving a lien on boats and other vessels for construction, repairs, &c., applies exclusively to vessels intended for navigation.*Ibid.*

5. The act of 1838 preserves the liens of judgments in the case of an insolvent estate.—*Black v. Wilson*.....532

LIMITATIONS, STATUTE OF.

See CHANCERY, 6, 7, 8, 10, 12.

1. A person to whom an account of more than five years' standing was presented did not object to the account, but said he thought he had

- paid it, and had the receipt at home. *Held*, that this was not a sufficient acknowledgment to take the case out of the statute of limitations.—*Conwell v. Buchanan*.....537
2. But a payment on account of principal or interest will take the case out of the statute.....*Ibid.*

LIS PENDENS.

See VENDOR AND PURCHASER 17.

LOST NOTE.

See PROMISSORY NOTES, 14, 22, 23.

M

MALICIOUS PROSECUTION.

See ACTION ON THE CASE

1. A count in malicious prosecution alleged that the defendant, intending, &c., went before a justice, &c., and falsely, &c., and without, &c., charged the plaintiff, &c., and thereupon falsely, &c., and without, &c., procured the justice to make his warrant, &c. *Held*, that the count was not objectionable because the alleged charge did not authorize the issuing of the warrant.—*Collins v. Love*.....416
2. A count in such action stated that the defendant, contriving, &c., heretofore, viz., on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatever, charged the plaintiff with having committed perjury, and with having willfully and feloniously, &c., sworn false, &c., and on the last-mentioned charge, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatever, procured the plaintiff to be arrested by his body, and to be imprisoned for the space of twelve hours, and until the defendant, afterwards, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatever, procured the plaintiff to be conveyed in custody before Aaron Note, then and there being a justice of the peace, &c., to be examined, &c.; that said justice, having heard and considered all that the defendant could say against the plaintiff, touching and concerning the said supposed offense, adjudged that the plaintiff was not guilty, &c., and caused him to be discharged, &c.

To the plaintiff's damage, &c. *Held*, that this count was not so defective as to authorize the Court to instruct the jury to disregard it.....*Ibid.*

3. In such suit against A. B., an affidavit, charging the plaintiff, &c., proved to have been made by A. B., and agreeing with that described in the declaration, is admissible evidence for the plaintiff.....*Ibid.*

MALICIOUS TRESPASS.

See INDICTMENT, 13.

MANSLAUGHTER.

See INDICTMENT, 7. VERDICT, 1.

MARRIAGE.

Indictment against a justice of the peace for failing to return to the clerk's office, &c., a certificate of the solemnization of a marriage, &c. *Held*, that an averment as to a license having issued was unnecessary, and should be rejected as surplusage.—*The State v. Wilder*.....582

MECHANICS.

See LIEN, 1, 2, 3, 4.

MESNE PROFITS.

In trespass for mesne profits, after judgment in ejectment, the defendant, to prevent a recovery of profits that accrued before service of the declaration in ejectment, may prove that he had not occupied the premises before such service.—*Vance v. The Inhabitants, &c*.....241

MISREPRESENTATION.

See CHANCERY, 18. PLEADING, 13. SALE OF GOODS. VENDOR AND PURCHASER, 12, 33.

MONEY HAD AND RECEIVED.

See USURY, 1.

A having obtained judgment against B for a certain sum of money, gave C a written authority to collect a certain part of the amount in A's name, and apply it to his (C's) own use. C received from B the amount of the order, and bound himself in writing to B to repay him the amount so received if the said judgment should be reversed. The judgment was afterwards reversed, and B sued A in assumpsit for money had and received, to recover back the money paid as aforesaid to C. *Held*, that

the action could be sustained. *Held*, also, that interest in such case could only be recovered, under the statute, from the time the money was demanded.—*Glover v. Foote*.293

MORTGAGE.

See DOWER, 2. SCHOOL-COMMISSIONER, 1, 2, 3, 4, 5, 6. VENDOR AND PURCHASER, 1, 2, 3, 10, 18, 25.

1. The mortgagee of real estate has a right to the immediate possession of the mortgaged premises, unless there be an agreement to the contrary expressed in the mortgage, or plainly inferable from it.—*Doe d. Shute v. Grimes et al.*.....1
2. The heirs of a mortgagee, or, in case of their non-residence, the executor or administrator of the mortgagee, may sustain ejectment for the mortgaged premises against the mortgagor, or his tenant claiming under a lease granted after the mortgage without the privity of the mortgagee.—*Doe d. Brown et al v. Mace et al.*...2
3. And the suit, in such case, may be brought without a demand of possession.....*Ibid.*
4. The sale of mortgaged land under a decree of foreclosure, &c., must be according to the statute in force when the mortgage was executed.—*Doe d. Wolf et al. v. Heath et al.*...154
5. A mortgagee in fee of real estate has the legal title to the estate, and the same right to transfer it by deed that he has to convey by deed the legal title of any other real estate. Indeed, as the statute is understood to require conveyances of land to be by deed, the legal title of such mortgagee can be conveyed by him to a purchaser in no other way than by deed.—*Givan v. Doe d. Tout*.....210
3. A separation of the legal title to mortgaged premises from the claim at law to the mortgage-debt frequently occurs; but if at any time before foreclosure the mortgagor or his assignee pay the debt, he is entitled to the legal estate.....*Ibid.*
- . Bill of foreclosure. A mortgage of real estate, given to secure the payment to the complainant of a *bona fide* debt, was not recorded until about two years and a half after it was executed. After its execution, and before it was recorded, the mortgagor contracted debts with other persons, for which, but not until after the mortgage was recorded,

judgments were obtained. There was no satisfactory evidence that the delay to have the mortgage recorded proceeded from any collusion between the mortgagee and the mortgagor to defraud the subsequent creditors. *Held*, that the mortgagee was entitled to the priority.—*Scott et al. v. McMurran et al.*.....284

8. The sale of a promissory note secured by mortgage is an equitable transfer of the mortgage to the purchaser of the note; and he should, therefore, be a party to a bill to foreclose, &c.—*Burton v. Baxter*.....297
9. A second mortgagee, before forfeiture, filed a bill in chancery against the first mortgagee, to compel him to surrender his mortgage, alleging that it had been paid. The bill did not show that the complainant was injured, or was likely to be injured, by the alleged incumbrance. *Held*, on demurrer, that the bill could not be sustained.—*Jones et al. v. Myers et al.*.....340
10. A mortgage of real estate to *A* was, in his absence and without his knowledge, signed and sealed by *B*, and delivered by him to the recorder of the proper county to be recorded; and *C*, afterwards, before the mortgagee had assented to the mortgage, obtained a judgment against the mortgagor. *Held*, that the judgment was entitled to the preference.—*Goodsell et al. v. Stinson*.....437
11. A subsequent mortgage of real estate, though first recorded, will not prevail against a prior one which is not recorded in time, if the subsequent mortgagee had actual notice of the prior mortgage.—*Sparks et al. v. The State Bank*.....469
12. If a judgment be obtained against a person subsequently to his execution of a mortgage, but before the mortgage is recorded, the mortgage, though it was not recorded in time, will have the preference. But, perhaps, a *bona fide* purchaser at sheriff's sale, under the judgment, might be protected by the statute.....*Ibid.*
13. On a decree of foreclosure and for a sale of the land mortgaged, the sale should be made in conformity with the statute in force when the mortgage was executed.—*Sheets v. Peabody*.....613

MURDER.

See INDICTMENT, 1, 2, 3, 4, 5, 6, 7

N

NEW ASSIGNMENT.

See TRESPASS, 14.

NEW TRIAL.

1. A new trial may be granted to a defendant in any criminal case.—*Weinzorpflin v. The State*.....186
2. The refusal of the Circuit Court to grant a new trial where the question depends merely on the credibility of a witness, will not be considered erroneous.....*Ibid.*
3. The granting of a new trial—the record showing no good cause for or against it—is not error.—*Nichols v. Smalley et al.*.....200
4. The plaintiff is not entitled to a new trial on the ground of surprise, occasioned by a witness whom he called giving different evidence from that which he expected him to give.—*Graeter v. Fowler et al.*...554

NIL DEBET.

See PLEADING, 12, 14, 18.

NOLLE PROSEQUI.

See VERDICT, 3.

NON DAMNIFICATUS.

See BOND, 10.

NON EST FACTUM.

See PLEADING, 32.

NON OBSTANTE VEREDICTO,
JUDGMENT.

See JUDGMENT, 3.

NON-RESIDENT.

See CHANCERY, 31. NOTICE.

NOTICE.

See CHANCERY, 31. EJECTMENT, 2, 4. GUARANTEE, 2, 3. PROMISSORY NOTES, 12, 32, 36, 37. VENDOR AND PURCHASER, 7.

Notice in a newspaper to a non-resident defendant in a bill in chancery to appear before the Circuit Court of the proper county on the first day of its next term, is sufficiently certain as to the time and place of appearance.—*Thomas v. Bailey*...149

NUISANCE.

On the trial of an indictment for estab-

lishing a noxious trade near certain dwellings, &c., the defendant may prove in bar of the prosecution, under the general issue, that the dwelling house in the vicinity of the place, &c., was built after the establishment of the alleged nuisance.—*Ellis v. The State*.....534

NUL TIEL RECORD.

See PRACTICE, 8. REPLEVIN, 2.

O

ONUS PROBANDI.

See EVIDENCE, 5, 17. VENDOR AND PURCHASER, 34.

ORDER.

See BILLS OF EXCHANGE, 6.

OYER.

See PLEADING, 15, 24. PROMISSORY NOTES, 25, 26. VARIANCE, 1, 3, 10.
In debt on a sheriff's bond, the defendants are not entitled to *oyer* of the approval of the bond by the judges; such approval being no part of the bond.—*Clark et al. v. The State*...570

P

PAROL AGREEMENT.

See AGREEMENT, 2, 3. EVIDENCE, 6. PRINCIPAL AND SURETY, 5. PROMISSORY NOTES, 30, 33. VENDOR AND PURCHASER, 4.

PARTNERS.

See PROMISSORY NOTES, 28, 29.

1. If two partners be indebted for goods sold and delivered, and one die in the lifetime of the other, the administrator of the deceased partner may, by statute, be sued at law for the debt.—*Parker et al. v. Miller*. 150
2. Although the admission of an individual member of a firm that he is a partner is evidence to charge himself, it is no evidence of the partnership against any other party.—*Pierce et al. v. McConnell*.....170
3. Assumpsit against *A. B.*, and *C.*, as partners. *A.* pleaded non-assumpsit; *B.* appeared and suffered judgment by *nil dicit*; and the writ was returned "not found" as to *C.* Held, that on the trial of the issue between the plaintiff and *A.*, the admissions

- of *B* of the existence of the partnership of *A*, *B*, and *C*, were inadmissible.....*Ibid*.
4. The existence of a partnership, like most other facts, may be proved by one witness; but it is otherwise as to the proof necessary to support an indictment for perjury. To sustain such an indictment, two witnesses, or one witness and corroborating circumstances, are indispensable.....*Ibid*. A dormant partner need not be joined in a bill in equity to enforce a contract against a person who dealt only with the ostensible partner.—*Goble v. Gale et al.*.....218
6. If *B*, a member of a firm, deal in his own name in business of the firm with *A*, who is ignorant of the partnership, the latter may be sued for a demand against him arising from such dealing, either by *B* alone or by the firm.—*Ward et al. v. Leriston*.466
7. And in a suit by the firm for such demand, *A*'s right of set-off is the same as if *B* had sued alone....*Ibid*.

PATENT RIGHT.

See PLEADING, 13.

PAYMENT.

- See ACCORD AND SATISFACTION, 1. BOND, 12. JUSTICE OF THE PEACE, 5.
1. A person who owes money on different contracts has a right to apply his payments to which of the debts he chooses; but if he fail to elect, the creditor may make the application.—*Howland v. Rench et al.*.....236
2. The application of payments may be proved by circumstances as well as by words.....*Ibid*.
3. If after the dissolution of a partnership between *A* and *B*, the parties agree that the former shall pay, with his own funds, certain debts of the latter, and certain debts of the firm, in discharge of a note which, previously to such agreement, had been given by *A* to *B*, and the payments be accordingly made, such payments, to the amount of the private debts of *B*, and of half of the partnership debts thus paid, constitute a good defense to a suit at law on the note.—*Griffith v. Hill*.....324

PERJURY.

See INDICTMENT, 8, 9, 10. PARTNERS,

4. SLANDER, 22.

It is perjury to swear falsely to a ma-

terial point in an affidavit for the continuance of a cause.—*The State v. Johnson*.....49

PLEADING.

See ABATEMENT. ACCORD AND SATISFACTION. BILLS OF EXCHANGE, 7. BOND, 10, 11. DELIVERY-BOND. EXECUTORS AND ADMINISTRATORS, 5, 12, 13. MALICIOUS PROSECUTION, 1, 2. PROMISSORY NOTES, 10, 11, 24, 28. RECOGNIZANCE, 3, 4, 7, 8, 9. REPLEVIN, 1, 2, 5, 10. RESTRAINT OF TRADE, 2. SCIRE FACIAS, 1, 6, 11. SHERIFF. TRESPASS, 1, 2, 5. VENDOR AND PURCHASER, 8, 22, 23, 24, 26, 27, 28, 29.

1. Debt by the State, on the relation of *A*, on the official bond of the clerk of a certain Circuit Court. The breach assigned in the declaration was that *B* had recovered judgment in that Court for a certain sum of money against *C*; that the judgment had been assigned to the relator, in the order book of the Court, by *B* under his hand and seal; that the money had been paid to the clerk, who had refused to pay it over, &c. Held, that *propter* of the assignment of the judgment was unnecessary.—*The State v. Stewart et al.*.....9
2. A count on an instrument of writing by which the defendant acknowledged he had received, by the hand of *J. S.*, \$200 in favour of the plaintiffs, is insufficient.—*Ephraims et al. v. Murdock*.....10
3. Debt by the State, on the relation, &c., on a justice's bond against him and his surety. Plea, general performance. Replication, assigning as a breach the justice's failure to pay over money collected. Rejoinder, that the relator had recovered a judgment against the justice for the same money. Held, that the rejoinder was a departure. Held, also, that such judgment, unless satisfied, was no bar to a suit on the bond against the justice and his surety. Held, also, that though the justice's bond was conditioned for the payment, *on demand*, of the money collected, a general averment in the replication of non-payment *although often demanded*, was sufficient on general demurrer.—*Bell v. The State*.33
4. A corporation suing in its true name on a bond executed to it by a wrong name, should aver in the declaration that the defendant bound himself to

- the plaintiff by the name contained in the bond.—*The President, &c., of Fort Wayne v. Jackson et al.*.....36
5. Debt on a replevin bond against *A* and *B*. Plea, that, after the suit was commenced, the same had been, on, &c., settled and compromised by the parties; and that it was then agreed by the plaintiff and *A* that the suit should be dismissed at the defendants' costs; which costs, amounting to \$6.09, *A* had paid according to the agreement; which the defendants were ready to verify. *Held*, that the plea was bad.—*Jaques v. Denekie et al.*.....40
6. A plea which professes to answer the whole cause of action, but answers only a part, is bad.—*Mullikin et al. v. The State*.....77
7. Same point.—*Mahan et al. v. Sherman*.....378
8. Same point. — *Cottingham v. The State*405
9. Same point.—*Jacobs v. Finkel*...432
10. Same point.—*Conard et al. v. Dowling*481
11. A plea, apparently good on its face, can not be set aside upon an affidavit that it is false.—*Walpole v. Cooper*100
12. Debt on a sealed note. Pleas: 1, *Nil debet*. 2, That the note was given without any good or valuable consideration. 3, That the note was given by the defendant, who was the administrator of one *A*, deceased, to the plaintiff in consideration of a debt which *A*, at the time of his death, owed the plaintiff, and for no other consideration. Replication to the second plea, that the consideration had not failed in manner and form, &c. *Held*, that the first and third pleas were bad, and the replication good.—*Gregory v. Logan*..112
13. Covenant on a sealed note brought by an assignee against the maker. Pleas: 1, Failure of consideration, without showing what the consideration was, and how it had failed. 3, That the note was given in part consideration of a deed made by the payee of the note, by which he sold the defendant the exclusive right of making, &c., an alleged new and useful improvement in the machine for steaming and renovating feathers, for which a patent had been granted, &c.; that the payee of the note had no authority to sell, &c., because the assignment of the patent to him by the assignee of the patentee had not been recorded, &c. 4, That the payee of the note warranted that said machine would greatly improve old feathers, &c., when in truth it does not improve them, &c. 5, The same as the 4th, with the additional averment that the payee of the note knew that the machine would not improve old feathers, &c., and that by means of said false representations the defendant was induced to purchase the machine. *Held*, that the 1st, 4th, and 5th pleas were bad, and that the 3d was good.—*Mullikin et al. v. Latchem*.....136
14. In debt on a specialty, the plea of *nil debet*, though bad on general demurrer, is not a nullity; and a final judgment for the plaintiff in such suit, there being a plea of *nil debet* unanswered, is erroneous.—*Tate v. Wymond*.....240
15. If on *oyer* craved of a bond of which *profert* is made in the declaration, the bond can not be produced, the declaration, by leave of the Court, should be amended by leaving out the *profert*, and inserting an excuse for not making it.—*Meriam et al. v. The State*.....245
16. A plea putting in issue matters of fact and of record should conclude to the country; and the issue should be tried by a jury.—*Grimes v. Alsop*. 269
17. Suit by the State, on the relation of *A*, on a justice's bond, brought for money collected by the justice on a judgment rendered by him, and alleged to have been assigned to the relator. *Held*, that a plea denying the assignment should be sworn to.—*Hooker et al. v. The State*.....272
18. The plea of *nil debet* to debt on bond is bad on general demurrer.....*Ibid*.
19. A plea which confesses the cause of action, and avoids it by some new matter, does not amount to the general issue.—*Page v. Prentice et al.*322
20. If, after the refusal of the Court to reject a plea, the plaintiff reply to or join issue on the plea, the refusal to reject the plea can not be assigned as error.—*The State v. Bodily et al.*...355
21. The Court may permit the plaintiff to withdraw a demurrer to a plea and reply to it, after the giving of an opinion against the plea, but before judgment rendered on the demurrer.—*Berry et al. v. McDonald*..... 371

22. Declaration in assumpsit by *Joseph Harter*, alleging that the defendant made his promissory note, commonly called a due-bill, by which he acknowledged himself indebted to the plaintiff by the name of "The estate of *Thos. Eager*, deceased," the plaintiff being the administrator of said estate, in the sum of, &c.; and then and there delivered the same to the plaintiff. *Held*, that the declaration was good and that a writing agreeing with that described in the declaration was admissible evidence for the plaintiff.—*McKinney v. Harter*.....385
23. A plea asserting a right founded on a statute should aver every fact necessary to show that the case is within it.—*Ezra v. Manlove*.....389
24. If a defendant, having craved and obtained *oyer* of an instrument declared on, demur to the declaration without spreading the instrument on the record, the demurrer stands as if *oyer* had not been craved.—*Daniels & al. v. Richie et al.*.....391
25. A declaration is not objectionable because it describes the plaintiffs as executors, and sets out a cause of action in their own right.....*Ibid.*
26. If the declaration in debt on a guardian's bond assign specific breaches, a plea that the defendant had faithfully discharged the duties of his guardianship is bad; so, also, is a plea in such case that the defendant was not guilty of the alleged breaches.—*Cottingham v. The State.* 405
27. The declaration in such suit alleged that the defendant had failed to pay over certain money to his ward after he had arrived at full age. *Held*, that a plea that the defendant had lent the money, &c., should show that the loan was authorized by an order of the Probate Court.....*Ibid.*
28. A plea professing to answer "part of the declaration," without specifying what part, is valid, if it directly deny a particular and material allegation in the declaration. But the sustaining of a demurrer to such plea is no cause for reversing a judgment for the plaintiff, if that part of the declaration denied by the plea was not taken into consideration in assessing the damages.....*Ibid.*
29. If a count would be considered good after verdict for the plaintiff, the jury ought not to be charged to disregard it.—*Collins v. Love*.....416
30. A plea to a suit on a promissory note relied on the plaintiff's non-performance of a certain agreement set out in the plea. The replication described the agreement, which differed materially from that stated in the plea. *Held*, on general demurrer, that the replication was valid; it being a substantial denial of the plea.—*Conard et al. v. Dowling*.....481
31. A rejoinder professing to be to the whole of said replication, but only attempting to answer an immaterial part, was held to be bad.....*Ibid.*
32. In debt on a writing obligatory, *non est factum* puts nothing in issue but the execution of the instrument; the other material allegations in the declaration are admitted by the plea.—*Utter v. Vance*.....514
33. A plea must state facts in a direct and positive form, and not leave them to be collected by inference.—*Stonsel v. Abrams*.....516
34. In case of a misjoinder of actions, there should not be a separate demurrer to each count, but one demurrer to the whole declaration.—*Fletcher et al. v. Piatt*.....522
35. Where the general issue is pleaded, any other pleas merely amounting to the general issue may be rejected on motion.—*Jackson et al. v. Yandes et al.*.....526
36. A demurrer to a replication, because it is argumentative, should show how it is argumentative.—*Jarrell et al. v. Snyder*.....551
37. A declaration in debt is not objectionable because it claims less than the sum mentioned in the *queritur*.—*Thompson v. Weaver*.....552
38. Debt on a county treasurer's bond. Breaches assigned in the declaration: 1, That the treasurer did not make settlement with the county auditor, &c.; 2, That he did not pay over the State revenue, &c. Pleas: 1, Not guilty; 2, Performance in general terms. *Held*, that the pleas were bad.—*Kindle et al. v. The State.* 586
39. Where two pleas are substantially the same, one of them should be rejected on the plaintiff's motion.—*Lomax v. Bailey*599
40. A demurrer to a plea assigning for cause that the plea is double, without showing in what the duplicity consists, is a general demurrer. *Ibid.*

PRACTICE.

See BOND, 8. EVIDENCE, 8. INQUIRY, WRIT OF. INSTRUCTIONS TO JURY, 4. JURY. PLEADING, 11, 21. RELATOR, 3.

1. A judgment against one defendant, in an action on contract against two, is erroneous, unless there be a suggestion of "not found" as to the other.
Bell v. The State.....33
2. In an action against three persons, founded on contract, a judgment against two of them only is erroneous, unless there be a return of "not found" as to the other, and a suggestion of the return entered of record.—*Heaton et al. v. Fulghum*.....101
3. In debt there were two issues in fact—one was immaterial; the other was valid, and on a plea in bar of the whole cause of action. Verdict for the defendant. Held, that the immateriality of one of the issues was no cause for setting aside the verdict.—*The State v. Hood et al.*127
4. Debt on a writing obligatory. Pleas: *nil debet* and payment. Judgment by default. Held, that the judgment was erroneous.—*Collins v. Harbold*.
157
5. If a defendant appear to an action before a justice of the peace without objecting to the process, he can not object to it on appeal in the Circuit Court.—*Vermilya et al. v. Davis*...158
6. Two counts in assumpsit, the first of which was bad. Pleas to the first count, and general demurrers to the pleas. Held, that the first count being bad, the defendant was entitled to judgment on the demurrers.—*Ferguson v. Rhoades*.....262
7. A matter of fact, improperly alleged in pleading to be a matter of record, may be referred to a jury.—*Grimes v. Alsop*.....269
8. The issue on a plea of *nul tiel record* should be tried by the Court, and not by a jury.—*Hooker et al. v. The State*.
272
9. If objectionable testimony admitted by the Circuit Court do not appear to have been objected to, it will be presumed that it was admitted by consent. *Stephens et al. v. Lawson*.275
10. In debt against *A* and *B*, the process was served on the former only, but both afterwards appeared to the suit. *A* pleaded to the action; *B* said nothing. The cause was submitted to the Court, and judgment rendered against *A* alone. Held,

that the judgment, being against only one of the defendants, was erroneous.—*Heaton v. Collins*.....414

11. A defendant, by appearing to a suit in a justice's Court, and pleading in bar, waives all objections to the form of the process.—*Dudley v. Fisher*553
12. If *A*, the surety in a replevin-bond, be a material witness for the plaintiff in the action of replevin, the Court should permit another surety to be substituted by the plaintiff in *A*'s place. *Brewer v. Murray*.....567
13. A trial in a suit without an issue is erroneous.—*Shiel v. Ferriter*....574

PRESIDENT JUDGE.

See JURISDICTION, 2.

A president judge could not, under the statute of 1838, take a recognizance out of Court returnable to a Circuit Court out of the county in which it was taken.—*Paine et al. v. The State*.....206

PRINCIPAL AND AGENT

See PROMISSORY NOTES, 5.

PRINCIPAL AND SURETY.

See SET-OFF, 5, 6.

1. When the surety of a guardian becomes dissatisfied, and applies to be discharged from further responsibility, and a further bond with additional surety is thereupon given for the performance of the condition of the former bond, the surety in the new bond is liable for the previous as well as subsequent defalcations of the guardian.—*Armstrong et al. v. The State*.....81
2. An executor's bond was conditioned that if *A* should well, &c., perform his duties, &c., as executor of *B*, deceased, then the bond to be void, &c. Held, that the surety in the bond was not liable for any previous acts of the executor.—*The State v. Hood et al.*.....127
3. A sheriff having collected money on an execution, died without having paid over the money, and the judgment was afterwards reversed. Held, that a suit on the sheriff's bond, on the relation of the execution-defendant, against the sureties of the sheriff for the money so collected, would not lie.—*The State v. Vananda et al.*.....214
4. If in an appeal to the Circuit Court

from a justice's judgment against two persons, the appellee, by consent of parties, take judgment against one of the appellants without the consent of the surety in the appeal-bond, the surety is discharged.—*Shiner v. Hightshue*238

A specialty creditor made a parol agreement with his principal debtor on the day the debt became due, without the surety's consent, to give him (the principal debtor) the further time of one year for payment; and the time was given accordingly. *Held*, in an action of debt against the surety, that these facts were no defense to the suit.—*Tate v. Wymond*240

PRISON-LIMITS.

A *ca. sa.* issued under the statute of 1838 on a justice's judgment, without a previous return of *nulla bona* to a *fi. fa.*, or an affidavit filed as prescribed by the statute, is illegal; and a bond for the prison-limits, executed upon the arrest of the judgment-debtor on a *ca. sa.* so issued, is without consideration.—*Gresham v. Bowen et al.*423

PROBATE JUDGE.

A probate judge could not, in 1842, take a recognizance returnable to a Court out of his county.—*The State v. Montgomery et al.*221

PROFANE SWEARING.

See APPEAL, 3.

PROFERT.

See PLEADING, 1, 15.

PROMISSORY NOTES.

1. Although the payee's name in a promissory note have been partially erased so as to be illegible, still a suit on the note may be sustained against the maker by proof that it was executed by him, that it was made payable and was delivered to the plaintiff, that the latter had possession of the note when he commenced the suit, and that his name in it had been erased under circumstances showing the validity of the note not to be affected by the erasure.—*Justus v. Cooper*7
2. On the trial of a suit on such note proved to have been executed by the defendant, the plaintiff offered to

prove that the note was originally made payable to him, and that he was in possession of it when he commenced the suit. *Held*, that those facts might be proved as links in the chain of the plaintiff's evidence.—*Ibid.*

3. An indorsement in blank by a third person of a promissory note negotiable, &c., made at the date of the note, does not, of itself, render the indorser liable, as a maker, to the payee.—*Early v. Foster et al.*35
4. But as the indorsement may be made under such circumstances as to render him so liable, a note thus indorsed is admissible evidence in a suit by the payee against such indorser and the maker, as joint makers, as a link in the chain of the plaintiff's evidence.*Ibid.*
5. *Duffield* brought an action of debt against *McHenry, Tilford, and Ratts*. The first count was on an instrument of writing by which, as alleged, the defendants acknowledged themselves to be indebted to the plaintiff in a certain sum of money, on settlement, in full for joiners work of the *New Washington Seminary*. The second count was founded on an instrument of writing in the following words: "April 6th, 1842. Due *John H. Duffield*, on settlement, the sum of \$239 in full for the joiner's work of the *New Washington Seminary*. (Signed) *James McHenry, R. Tilford, F. Ratts*, Building Comm., in behalf of the Trustees of the *New Washington Seminary*." *Held*, that such an instrument of writing as that set out in the second count did not sustain the first count, and that the second count showed no cause of action against the defendants. *Held*, also, that if the defendants were authorized to execute the instrument for the trustees, the suit should have been against the trustees; and if the defendants were not so authorized, they were liable in an action on the case for acting in the matter without authority.—*McHenry et al. v. Duffield*41
6. If a person sue as payee on a promissory note so mutilated that the payee's name is illegible, he must prove that the note was made to him, that he had possession of it when he commenced the suit, and that it was mutilated under circumstances not affecting its validity.—*Hatch v. Dickinson*48

7. The assignee of a promissory note, not negotiable by the law merchant, may maintain a suit in equity against a remote assignor.—*Dorsey v. Hadlock et al.*.....113
8. But a suit at law does not lie in such case.....*Ibid.*
9. A *fi. fa.* issued on the 18th of May, on a judgment which was recovered without delay on the 25th of the preceding month, by an assignee against the maker of a note. All the defendant's property that could be found was levied on and sold, but the proceeds of the sale paid only a part of the debt. *Held*, that the diligence used was sufficient to charge a remote indorser, in equity, for the balance due on the note.....*Ibid.*
10. Two counts in debt. To the first, which was on a promissory note given in 1841, with interest at ten *per cent. per ann.*, the defendant pleaded that, on, &c., he bought of one *B* a certain lot of ground for \$1,000, and executed to him therefor two notes of \$500 each, with interest at six *per cent. per ann.*, taking from *B* a bond conditioned for a conveyance for the lot on request; that *B* assigned the notes to the plaintiff, which, at the plaintiff's request, and not upon any valuable consideration, the defendant took up and gave the note in said count mentioned, and another for —; and that *B* had no title to the lot. To so much of the interest on the note described in the first count as exceeds six *per cent. per ann.*, the defendant pleaded that he executed two notes of \$500 each, at six *per cent. per ann.* interest, to one *B* for a certain lot of ground; that *B* assigned the notes to the plaintiff; and that, on, &c., in 1841, the defendant, at the plaintiff's request, and not upon any valuable consideration, took up said notes and gave the note in said count mentioned, and another for —; they being for the balance due on the assigned notes. *Held*, that both said pleas were bad.—*Justice et al. v. Charles.*.....121
11. The second count was on a promissory note given in 1842, with interest at ten *per cent. per ann.* *Held*, on demurrer to this count, that so much of the second section of the act of 1838, regulating interest, as allowed more than six *per cent. per ann.*, was repealed by an act of 1842; that the note described in said count, which was given after such repeal, was usurious and void; and that the count was therefore bad.....*Ibid.*
12. A promissory note was payable to two persons not partners, and indorsed by them. *Held*, that notice by the holder of the maker's non-payment should be given to each of the indorsers.—*The State Bank v. Slaughter* ... 133
13. If two persons make a promissory note, and one of them afterwards obtain possession of the note as his own property from the payee, the note is discharged.—*Cox et al. v. Hodge.*146
14. Debt by an assignee against the maker of a promissory note alleged to be lost. Pleas: *Nil debet* and failure of consideration. *Held*, that the oath of the plaintiff was admissible to prove to the Court the loss of the note. *Held*, also, that to enable the plaintiff to recover, he must prove by disinterested witnesses, not only the contents of the note, but that there was on it an indorsement to himself.—*Dean v. Keen*.....152
15. If it be the understanding of the assignor and assignee of a promissory note at the time of the assignment, that the assignee need not demand payment of the maker before a certain time, no laches can be imputed to the assignee for not commencing suit on the note before that time.—*Nance v. Dunlavy*.....172
16. The assignee of such note obtained judgment on it against the maker on the 15th of March. *Held*, that the assignee could not, during that month, be charged by the assignor with laches for not having taken out execution*Ibid.*
17. Debt on a promissory note. Plea, the general issue. The defendant proved that the note had been given in consideration of the payee's assignment to him of his right to certain fees, but he did not show they had not been collected. *Held*, that the proof was not sufficient to defeat the suit.—*Biggs v. Evans*.....277
18. The assignor of a promissory note can not complain that the assignee's suit against the maker was not commenced in time, if judgment was obtained on the note at the first term of the Court after the assignment.—*Spears v. Clark*.....283
19. A *fi. fieri facias* on such judgment

- should be issued within a reasonable time after the close of the term at which the judgment was rendered. *Ibid.*
20. Where the judgment in such case was rendered on the 21st of *August*, and the execution issued on the 21st of *September* following, it was held, (the time when the Court adjourned not being shown), that the execution did not appear to have issued in time to bind the assignor.....*Ibid.*
21. A promissory note given to the county commissioners, in consideration of their appointment of a certain person to the office of collector of the revenue, is void.—*The Board of Commissioners, &c., v. Mullikin et al.* 301
22. If a promissory note sued on be torn, and a part of it lost, a copy of the entire note sworn to is admissible evidence.—*Dean v. Speakman.* 317
23. An action at law lies on an unnegotiated promissory note which has been lost or destroyed.....*Ibid.*
24. *G.*, as assignee, sued *N.*, as assignor, of a promissory note, payable to *N.*, and negotiable and payable at a branch of the State Bank. The declaration showed, *inter alia*, that the maker of the note had refused to pay, and that the plaintiff knew of his default. Plea, that *G.* indorsed his name on the note, at the instance of the maker, for the purpose of guaranteeing its payment to *N.*, and that the maker afterwards delivered to *N.* the note so indorsed; and that *N.* afterwards sold the note to one *S.*, and indorsed his (*N.*'s) name on it, for the purpose of transferring it to *S.* Replication, that the indorsement of the note by the defendant was made before the plaintiff indorsed the note. Held, that the plea and replication were both good.—*Grimes v. Newell*.....319
25. In a suit on a promissory note by an indorsee, the note and indorsement, if *oyer* of them has been asked and given, are a part of the declaration.—*Chapman v. Harpey et al.*....333
26. And if the suit on such note be by two persons as indorsees, and the indorsement shown on *oyer* be to only one of them, the suit can not be maintained.....*Ibid.*
27. Assumpsit by the assignee against the assignor of a promissory note. A judgment had been obtained against the maker, and a *fi. fa.* issued in due time. The *fi. fa.* was returned levied on certain property, which remained unsold for want of buyers. About five months after said return, an *alias fi. fa.* issued, and was returned no property found. Held, that the second execution and the proceedings on it were void; that on the return of the first execution, a *venditioni exponas* should have issued; and that, under the circumstances, the plaintiff could not recover.—*Macy v. Hollingsworth*.....349
28. Suit by *A.*, for the use of a certain Packet Boat Company, against *B* and *C*, on a promissory note payable to the plaintiff, for the use of said company. *B* pleaded in bar that he and the plaintiff were, at the time of making the note, and still were, partners in said company; that the plaintiff held the note in trust for said company; and that the consideration of the note was certain canal-boats, &c., purchased by the defendants of the company. Held, that the plea was bad.—*Mahan et al. v. Sherman*.....378
29. But had the note been payable to the company, a suit on it by the company could not have been sustained; for *B* being one of the company, the same person would then have been both plaintiff and defendant.....*Ibid.*
30. A verbal contract, made at the time a promissory note is executed, varying the terms of the note, can not be set up to defeat a suit on the note.....*Ibid.*
31. A printed form of a promissory note, payable ninety days after date, at the branch bank at *Lafayette*, was signed by *A* and indorsed by *B*; blanks were left for the date, the payee's name, and the sum; and in the margin there was a printed direction to "credit the drawer," signed by *B*. The note in this form was submitted by *A* to said bank, for the purpose of renewing a note of the same parties in bank, about to become due. *A* not being prepared to pay the part of the debt required, the bank refused to renew at ninety days, but was willing to do so at thirty days. *A* being informed of this by the clerk of the bank, directed him to make the note payable in thirty days, which, without *B*'s consent, was accordingly done; the word ninety being struck

out and thirty inserted in its place. The blanks were filled, &c., the one for the date with the day when the old note fell due. *Held*, that *B*, in consequence of the change thus made in the time of payment of the note, was not liable as indorser thereof.—

Bell et al. v. The State Bank.....456

32. If the indorser of a promissory note, payable at a bank at *A*, reside four or five miles from *A*, in the country, and use the post-office at *A*, (it being as near his residence as any other), notice of the non-payment of the note may be given to him by putting the notice into the post-office at *A*, directed to him there.....*Ibid*.

33. Parol evidence is not admissible to show that a promissory note, payable on its face on a certain day, was to be paid at that time only on a contingency mentioned in a written contract between the parties, made before the execution of the note.—*Miller et al. v. While et al.*.....491

34. In a suit on the assignment of a promissory note, it appeared that the maker had died on the fifth day of the term of the Court next after the assignment, leaving considerable personal property, but not sufficient to pay his debts; that his real estate, which was sold after his decease, was not sufficient to pay the liens which were on it at the time of his death; that the note, which was previously due, was assigned about the 15th of *December*, 1839, and the next term of the Court commenced in *March*, 1840. The dates of said liens were not shown. *Held*, that the maker's insolvency was not sufficiently proved to excuse the plaintiff for not having sued him.—*Black v. Wilson*.....532

35. *Held*, also, that the circumstance that several suits by other persons against the maker had abated at said term was not sufficient, of itself, to show that the plaintiff could not have obtained judgment against him.....*Ibid*.

36. A protest of a promissory note, negotiable and payable at a branch of the State Bank, alleging that the notary had demanded payment of the note, &c., and given notice of its dishonour, &c., is legal evidence.—*Fisher et al. v. The State Bank*....610

37. One of the indorsers of such note lived about a mile from *Fort Wayne*.

Held, that notice of the dishonour of the note addressed to him at *Fort Wayne*, and put into the post-office at that place, was sufficient.....*Ibid*.

38. In computing the time for payment of such note, payable a certain number of days after date, the day of the date is excluded; and the demand of payment should be made on the third day of grace.....*Ibid*.

PROSECUTING ATTORNEY.

Indictment for malicious trespass. Verdict as follows: "We, the jury, find the defendant guilty in manner and form as charged in the indictment, and assess his fine at \$12.00, and two days' imprisonment in the county jail." The prosecuting attorney remitted the imprisonment, except six hours, and judgment was rendered against the defendant for \$12.00, and that he be imprisoned six hours, and pay the costs. *Held*, that the prosecuting attorney had no authority to enter the *remittitur*. *Held*, also, that the judgment, though erroneous for not agreeing with the verdict, could not be reversed on a writ of error brought by the State.—*The State v. Brewer*.....45

PUBLIC POLICY.

See PROMISSORY NOTES, 21. *SHERIFF'S SALE*, 4.

PURCHASER.

See VENDOR AND PURCHASER.

Q

QUERITUR.

See PLEADING, 37.

QUO WARRANTO.

An information in the nature of *quo warranto*, under the statute, for usurping, &c., an office, should be exhibited by the prosecuting attorney, and should commence as follows: *A. B.*, prosecuting attorney of the — judicial circuit of the State of *Indiana*, comes here into the Circuit Court of the county of —, on, &c., and for the said State, on the relation of *C. D.*, of, &c., according to the form of the statute in such case made and provided, gives the Court here to understand and be informed, &c.—*Eaton v. The State*65

R

RAPE.

See INDICTMENT, 19.

RECOGNIZANCE.

1. Debt lies on a recognizance taken by a justice of the peace for the appearance before him, on a subsequent day, of a person charged with an offense.—*The State v. Inman*.....225
2. And if the penalty be beyond a justice's jurisdiction, the suit may be brought in the Circuit Court....*Ibid.*
3. The declaration in such case need not aver that the recognizance was taken in consequence of a continuance by the justice of the examination of the person charged.....*Ibid.*
4. A breach assigned in the declaration, in such case, that the person charged did not appear before the justice, &c., and answer, &c., and abide the judgment of the justice thereon, is sufficient on general demurrer.....*Ibid.*
5. In the case of a forfeited recognizance, an execution can not be awarded against a recognizor on whom a *scire facias* has not been served, and who has not appeared, until there have been two returns of *not found* to writs of *scire facias* against him, directed to the sheriff of the county in which the recognizance was taken.—*Graham et al. v. The State*.....313
6. *Quære*, whether a recognizance taken by a judge for the principal's appearance at the next term of the Court, &c., need be recorded.—*James v. The State*.....325
7. In debt on a recognizance indorsed on process requiring bail, the declaration need not aver that a *ca. sa.* had issued against the principal.—*Bolles v. Haines*.....398
8. The declaration in such case should set out the recognizance in terms, or according to its legal effect.....*Ibid.*
9. The defendant in such suit pleaded that, on, &c., (the date of the recognizance,) the principal was and had ever since been notoriously insolvent. He also pleaded that no sufficient *capias ad respondendum* had issued in the original suit. *Held*, that these pleas were bad.....*Ibid.*
10. If in such suit some of the issues are on pleas of *nul tiel record*, and the others on pleas of payment, and are all found for the plaintiff, the

former by the Court, and the latter by a jury, the jury should find the amount due the plaintiff.....*Ibid.*

RECORD.

See CHANCERY, 30. CIRCUIT COURT, 1, 2. CRIMINAL LAW, 1, 2, 5, 6, 7. The clerks of the Circuit Courts are not authorized to make a final record in any cause, at the costs of the losing party, except in certain cases, unless such party direct the record to be made.—*Carpenter et al. v. Montgomery*.....415

RELATOR.

1. In a suit by the State on a school commissioner's bond, the writ must show the relator's name, either on its face or by an indorsement.—*The State v. Anderson et al.*.....222
2. If in a suit by the State on a collector's bond, the relator's name be inserted in the body of the writ, an indorsement of his name on the writ is unnecessary.—*The State v. Leonard et al.*.....223
3. A motion to dismiss a suit for want of an indorsement of the relator's name on the writ, must be made on the defendant's first appearance to the suit.....*Ibid.*

RELEASE.

In debt on a writing obligatory, a plea of release should allege that the release was under seal.—*Griggs v. Voorhies et al.*.....561

REMITTITUR.

See PROSECUTING ATTORNEY.

REPLEVIN.

1. In an action on a replevin bond, a plea that the property replevied belongs to the plaintiff in replevin is bad.—*Davis et al. v. Crow*.....129
2. A replication in such suit assigned as a breach of the condition of the bond that the plaintiff in replevin did not without delay prosecute the action of replevin, but suffered a nonsuit therein, as appeared by the record, &c. *Held*, that a rejoinder of *nul tiel record* to the replication should conclude to the Court.....*Ibid.*
3. In an action on such bond, the plaintiff can not recover the fees paid to his lawyer in the replevin suit, nor compensation for his own attendance at Court in that suit, nor

- his lawyer's fees paid in the suit on the bond.....*Ibid.*
4. A constable seized some horses of *A* on an execution against him, and delivered them to *B* to be kept. *A*, without satisfying the execution, tendered to *B* the amount of the expense of keeping the horses, and demanded them. *B* having refused to deliver the horses, *A* replevied them, and afterwards suffered a non-suit in the action of replevin. *Held*, in a suit by *B* against *A* and his sureties on the replevin-bond, that the plaintiff was entitled to recover in damages a reasonable charge for the keep of the horses, and that he was not bound to receive the money tendered.....*Ibid.*
5. To debt on a replevin-bond, a plea that the goods replevied belong to the principal obligor is bad.—*Wallace et al. v. Clark*.....298
6. But on the execution of a writ of inquiry, after judgment in such suit for the plaintiff on demurrer, evidence of such ownership is admissible in mitigation of damages..*Ibid.*
7. A replevin-bond executed on *Sunday* is void; its execution being in violation of the statute which prohibits common labour on that day.—*Link v. Clemmens*.....479
8. Where goods were replevied on *Saturday*, and the statute required the replevin-bond to be executed within twenty-four hours after the replevy, it was held that *Sunday*, in such case, should not be counted. *Ibid.*
9. Replevin. The first count charged the tortious taking and unlawful detaining of the plaintiff's horse. The writ commanded the sheriff to summon the defendant to answer the plaintiff concerning the unlawful detention of the plaintiff's horse, &c. *Held*, on demurrer to that count, that the variance was fatal.—*Barnes v. Tannehill*.....604
10. To the second count, which was for unlawfully detaining the plaintiff's horse, the defendant pleaded that, at the time, &c., viz., on the 20th of *June*, 1840, at the county aforesaid, the horse was taken up by the defendant as an estray, he being then and there going astray, at defendant's place of residence in *Indian Creek* township, in said county, and the defendant being then and there a freeholder; that by virtue of

said taking up of the horse, the defendant had a right to detain him, and did detain him, until as herein-after mentioned; that afterwards, viz., on the 22d of *June*, 1840, at the county aforesaid, the defendant, pursuant to law, caused said taking up of the horse to be advertised in three of the most public places in said township, giving in the advertisements a particular description of the horse, and the time when he was taken up; that afterwards, viz., on the 25th of *June*, 1840, and before ten days had expired after advertising as aforesaid, the plaintiff brought this action of replevin, by virtue of which, he then and there obtained possession of the horse, &c.; and this the defendant is ready to verify; wherefore, he prays judgment, &c. *Held*, on special demurrer, that the plea was good.....*Ibid.*

REPLEVY.

Decrees in chancery for money were repleviable under the act of 1840. They may also be replevied under the act of 1843.—*Harris v. Cobb et al.*.....493

RESCINDING OF CONTRACT.

See CONTRACT, 1, 2, 3, 5, 6. VENDOR AND PURCHASER, 31.

RESTRAINT OF TRADE.

1. A contract in restraint of the right of making, selling, and trading fanning mills south of the *Wabash* river, within thirty miles of *Marion*, in *Grant* county, is not objectionable on account of the extent of space to which it extends, nor because the restriction is indefinite in point of time.—*Bowser et al. v. Bliss et al.*344
2. To a suit on a promissory note, the defendant pleaded that the note sued on, and other notes, &c., were given in payment for the "*Wabash Courier*" newspaper and printing establishment, &c., at *Terre Haute*; that in further consideration of said notes, it was agreed by the plaintiff that no newspaper or printing office should be established by him, or by any person for him, within fifty miles of that place; that one *T. D.*, who, at the time of the sale, owned one-half of said property, had since the sale established, and continued to publish, a newspaper called "*The Wabash Express*" in *Terre Haute*; that

the plaintiff, at the time of establishing the paper, and since, aided the said *T. D.* in establishing and continuing it, and, in fraud of his agreement, aided in diverting the patronage of the newspaper and establishment, sold as aforesaid, from the same; that by his aid and procurement, and in combination with said *T. D.*, the same was diverted and withdrawn from the "*Wabash Courier*," and transferred to "*The Wabash Express*;" to the injury, &c. *Held*, that the plea was insufficient.—*Conard et al. v. Dowling*481

RETROSPECTIVE LAWS.

See USURY, 7, 9.

RETURN OF EXECUTION.

See SCIRE FACIAS, 2. SHERIFF'S SALE, 3.

REVIEW, BILL OF.

See CHANCERY, 2, 3, 4, 5, 6, 23.

REVIVOR, BILL OF.

See CHANCERY, 20.

RIGHT OF PROPERTY, TRIAL OF.

See EVIDENCE, 3.

1. On a trial of the right of property in goods taken in execution, the claimant can not recover unless he prove himself entitled to the immediate possession of the goods.—*Philbrick v. Goodwin*.....18
2. The execution-defendant is a competent witness for the claimant on a trial of the right of property.—*Bradbury v. Dougherty*.....467

ROADS.

See HIGHWAY.

S

SALE BY SHERIFF.

See SHERIFF'S SALE.

SALE OF GOODS.

See PLEADING, 13.

1. In an action for the price of goods sold with a warranty, fraud in the sale is a good defense under the general issue, though there may have been no violation of the war-

ranty.—*The President, &c., of Connorsville v. Wadleigh*.....102

2. A willful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, is not fraud in law on the buyer if the latter was not deceived or misled by the representation*Ibid.*
3. A warranty that a fire-engine sold and delivered would perform as well as any other in the western country, is not to be considered violated because the warranted engine is inferior to others in that country much larger and more costly, if the inferiority be evident to a common observer*Ibid.*
4. The vendor of goods, though defrauded in the sale by the vendee, can not treat the sale as a nullity, whilst he willingly holds in his hands a valuable consideration which he received for the goods.—*Johnson v. McLane*.....501

SALE OF REAL ESTATE.

See VENDOR AND PURCHASER.

SCHOOL-COMMISSIONER.

See RELATOR, 1.

1. A school-commissioner's sale of land mortgaged to secure a loan of school funds, in consequence of the non-payment of interest, is void, unless he strictly pursue the authority given him by law.—*Williamson v. Doe d. Crawford*12
2. The school-commissioner's deed, in case of the sale of such land, not stating that he had taken the steps pointed out by the statute, (specifying them), is no evidence that he had taken those steps.....*Ibid.*
3. An entry made by such commissioner on the record of deeds, stating a satisfaction of the mortgage by a sale of the mortgaged premises, a notice given by him previously to the sale, &c., is no evidence of the facts therein stated.....*Ibid.*
4. The commissioner can not sell such lands until the lapse of six months after the interest has become due.*Ibid.*
5. It is the commissioner's deed alone that vests a title in the purchaser of such lands.....*Ibid.*
6. The commissioner's book of accounts with the congressional townships, containing charges against himself

- for interest received, is not, in ejectment by the purchaser of mortgaged premises, admissible to show the payment of the interest, unless the commissioner's testimony can not be procured.....*Ibid.*
7. The declaration, in a suit by the State, on the relation of a school-commissioner, alleged, under a *vide licet*, that the relator was appointed such commissioner on a certain day. Plea, that the relator was not appointed on that day *Held*, that the plea was bad, as tendering an immaterial issue. — *Wright et al. v. The State*.....63
8. A school-commissioner may be the relator in an action, founded on the bond of his predecessor, for the non-payment by the latter to his successor of the school funds in his hands at the expiration of his office...*Ibid.*
9. The declaration in such suit need not aver a special demand on the ex-commissioner to pay over the funds to his successor.....*Ibid.*
10. A congressional township can not be the relator in a suit, brought on the bond of an ex-school-commissioner, for the commissioner's not paying over to his successor, or the township trustees, the school funds of the township remaining in his hands at the expiration of his term of service; no demand having been made on him for the money while he was in office.—*The State v. Grant et al.*.....71
11. The successor of the ex-commissioner should, in such case, be the relator.....*Ibid.*
12. Debt by the State, on the relation of the inhabitants of a congressional township, in *Washington* county, against the school-commissioner of that county and his sureties, on their bond. The declaration shows that the boundary between the counties of *Washington* and *Orange* runs through said township; that the commissioner had lent out "school money," to secure which he had taken a mortgage for the use of the township; and that by the commissioner's neglect, &c., the money was lost. *Held*, that the declaration was bad—first, because it was not stated with sufficient certainty that the money belonged to the relators; and, secondly, because there was no averment that the trustees of the township had decided that the commissioner of *Washington* county should have jurisdiction over the school land of the township.—*The State v. Newby et al.*.....330
13. A promissory note was payable to *J. T.*, school-commissioner of the county of, &c., for the use of congressional township No. 14, &c. *Held*, that *J. T.* might, under the act of 1843, sue on the note in his own name.—*Thompson v. Weaver*.....552

SCIRE FACIAS.

See JUDGMENT, 2.

1. *Scire facias* to have execution in the Circuit Court on a justice's transcript. The writ alleged the recovery of a judgment by the plaintiff against the defendant, before a justice of the peace, for a certain sum, the issuing of a *feri facias* on the judgment, and a return of the execution *nulla bona*. It stated, also, that the justice afterwards filed in the Circuit Court a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that Court. *Held*, that the averment that the transcript had been recorded was immaterial; that a plea, therefore, denying that the transcript had been filed and recorded was bad; and that the plea should have denied only so much of the averment as states that the transcript had been filed.—*Bennett v. Jones et al.*.....110
2. The defendant can not, in such case, deny the truth of the constable's return of *nulla bona*.....*Ibid.*
3. If the transcript of the justice in such case states that the writ in the suit was returned by the constable as served on the defendant, that statement is, at all events, *prima facie* evidence of the due service of the writ.....*Ibid.*
4. To support a *scire facias* against bail for the stay of execution on a judgment of a justice of the peace, it must appear by the return of a *feri facias* against the principal that sufficient goods and chattels could not be found to satisfy the execution.—*Elliott v. Dougherty*.....199
5. It is not a sufficient objection for the bail in such case that the judgment and execution against the principals were in their partnership name.....*Ibid.*
6. A plea to a *scire facias* on a recognition of a former judgment, in the

- same cause of action, must show what the defense in the first action was, and that it involved the merits of the case.—*Paine et al. v. The State*.....206
- Averments in such *scire facias* that the recognizance was filed in the clerk's office on a certain day, and was then recorded, and that it was afterwards, on a different day, filed and recorded in open Court, are not repugnant.....*Ibid.*
8. The *scire facias* in such case averred that the recognizance was taken by the president judge of the third judicial circuit, at *South Hanover*, in that circuit. The recognizance, which was set out *in hæc verba* in the *scire facias*, did not show where it was taken. *Held*, that there was no variance.....*Ibid.*
9. A *scire facias* on the transcript of a justice's judgment, for execution against real estate, should show that a transcript of the justice's proceedings on the judgment was filed in the Circuit Court.—*Neuils v. Campbell*.325
10. *Scire facias* to have execution on a justice's transcript. *Held*, that the question whether there was a transcript of the justice's judgment, duly filed in the clerk's office, was for the Court to decide; the transcript, if filed, being a record of the Circuit Court.—*Scott v. Williams*.....370
11. To a plea in such case denying that there was a record of the justice's judgment in his Court, the replication should be that there was such a record in the justice's Court. *Ibid.*
12. A *scire facias* on a justice's transcript, &c., may be amended before plea by striking out an immaterial averment.—*Berry et al. v. McDonald*.371
13. *Scire facias* on a justice's transcript to have execution against land, the judgment-debtor, who was the patentee, being dead. *Held*, that evidence that the land was subject to a trust, or to a pre-emption right, was inadmissible.....*Ibid.*
14. A *scire facias* on the transcript of a justice's judgment for execution against real estate must show that the transcript of the judgment and proceedings was *certified* by the justice, as well as filed in the clerk's office.—*Haworth v. Maxwell*.....415
15. A joint *scire facias* will not lie on a several recognizance. And the objection, when shown by the *scire facias*, may be assigned for error.—*Lockwood et al. v. The State*.....417
16. *Sci. fa.* issued by a justice of the peace for execution against replevin-bail. The writ recited a judgment recovered by the plaintiff against *A*, before the justice, in 1840; the defendant's entering himself as bail; the death of *A*, in 1840; the granting of administration of his estate to *B*; the issuing of a *sci. fa.* by the justice against *B*, as administrator, and the revival of the judgment against him in 1844; the issuing of a *fi. fa.* against *B*, and the return thereof of *nulla bona*, &c. *Held*, that the writ was sufficient.—*Thompson v. Harbison*.....495
17. A suggestion in a *scire facias* for execution against real estate on a justice's transcript that it was made known to the justice that the defendant had lands in the county subject to execution, is sufficient after trial and judgment for the plaintiff.—*Shiel v. Ferriter*.....574
18. That the justice's transcript was filed in the clerk's office and recorded, is a material averment in such *scire facias*, and, if denied, must be proved.....*Ibid.*

SECONDARY EVIDENCE.

See EVIDENCE, 19, 20.

SECURITY FOR COSTS.

1. The refusal to dismiss the suit of a non-resident plaintiff for the insufficiency of a bond for costs is not error of which the defendant can complain, if his costs are secured by the bond.—*Harding v. Griffin*.....462
2. In a suit by *A* and *B*, administrators, for the use of *C*, it was held that *A* and *B*, if non-residents, might be required to give security for costs. *Griggs v. Voorhies et al.*.....561

SET-OFF.

See PARTNERS, 7. VENDOR AND PURCHASER, 36.

1. Assumpsit. The issues were whether a note, pleaded as a set-off, had been discharged by an accord and satisfaction, or in any other manner. The Court instructed the jury that if the note was, for value, surrendered to the plaintiff with a promise by him to account for the proceeds of it, the promise to account was the only

proper subject of set-off in the cause. *Held*, that the instruction was erroneous.—*Fellows et al. v. Kress*.....59

2. Assumpsit for goods sold and delivered, &c. Plea of payment, alleging that the plaintiff was indebted to the defendant in a certain sum for money had and received, &c. Replication in denial of the plea. *Held*, that a promissory note given by the plaintiff to a third person, and indorsed to the defendant before the suit was commenced, might be read in evidence by the defendant under the plea.—*Usher v. Stewart*.
310

3. A defendant in assumpsit, who pleads the general issue with notice of set-off, and furnishes a bill of particulars of the matters of set-off, is confined in his proof to the bill of particulars.—*Harding v. Griffin*..462
4. Under a general charge in such bill of cash to a certain amount, the defendant will not be permitted to prove that, in the capacity of executor, he had overpaid the plaintiff a legacy left him by the defendant's testator*Ibid*.
5. If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against his note payable to the principal and held by him.—*Jackson v. Adamson*.....597
6. Such payment is also a good set-off against the said note in the hands of an assignee, if notice of the assignment had not been given to the maker before the payment became a valid demand against the payee. *Ibid*.

SHERIFF.

See PRINCIPAL AND SURETY, 3.

1. In a suit by the State, on the relation, &c., on a sheriff's bond, an assignment of a breach that the sheriff had officially received money belonging to the relator, which he had failed to pay to him, &c., is insufficient: the relator's right to the money should in such case be shown.—*Meriam et al. v. The State*.
245
2. An assignment of a breach in such suit that the sheriff had sold land on execution to the relator, and received from him the price; that the sale was afterwards set aside; and that the sheriff had refused to pay

the money, on demand, to the relator, &c., is insufficient: an averment that notice had been given to the sheriff that the sale had been set aside, is necessary in such case.*Ibid*.

3. It is no answer to an allegation that a sheriff's sale had been set aside, that the execution had not been set aside.....*Ibid*.

SHERIFF'S BOND.

The declaration in a suit by the State on a sheriff's bond, need not aver that the bond had been approved and recorded.—*The State v. Cromwell et al*.....70

SHERIFF'S SALE.

See FRAUDULENT CONVEYANCE, 1, 2, 3, 4.

1. A purchaser of land on execution having failed to pay the purchase-money, the sheriff afterwards sold the land to another person for a less price than it first sold for. *Held*, that in the statutory proceeding by notice and motion against the first purchaser for the difference in the amount between the first and second sales, the notice must aver an offer by the sheriff to convey the land to the defendant before the second sale.—*Williams v. Lines*46
2. If a *fiery facias* be levied on real estate, and the defendant die before the completion of the execution, the sheriff may afterwards proceed to advertise and sell the land.—*Doe d. Wolf et al. v. Heath et al*.....154
3. The title of a purchaser of real estate at sheriff's sale, who pays the purchase-money and receives the sheriff's deed, can not be affected by the circumstance that the return of the execution is imperfect, or that none was made.....*Ibid*.
4. If a bidder at sheriff's sale of real estate prevent others from bidding, by representations respecting the object of his bid, and then buy the property at the sale at a price much below its value, the sale is void as against public policy, and as a fraud upon the judgment-debtor and his creditors.—*Bunts v. Cole et al*.....265
5. The statute of 1838 required that the motion for judgment against a purchaser of property on execution, who had failed to pay for the same, should be made, not by the execution-creditor, but by the officer who

made the sale.—*Laverty et al. v. Chamberlain*.....556

6. A Court of chancery will not compel a purchaser of real estate under a decree to complete his purchase until a report of the sale has been made and confirmed.....*Ibid.*

SLANDER.

1. Slander for calling the plaintiff a whore. The words were laid to have been spoken in 1842. Plea, that the plaintiff while sole and unmarried, on the 1st of *January*, 1834, had carnal connection with one *H.* Replication, that the plaintiff, before, and at the time mentioned in the plea, was betrothed to the said *H.*; that afterwards, on the 6th of *June*, 1834, she was lawfully married to him; that she lived with him a virtuous life until the 1st of *August*, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. *Held*, on general demurrer, that the replication was insufficient.—*Alcorn v. Hooker*.....58
2. When the plaintiff in an action of slander proves the speaking of the actionable words laid in the declaration, the law implies that the words are *false*, and that they were spoken *maliciously*, unless there is evidence sufficient to satisfy the jury to the contrary.—*Byrket v. Monohon*.83
3. If in slander for charging the plaintiff with perjury, the defendant justify on the ground that the words are true, the plaintiff may prove, on the trial, his general good character for truth.....*Ibid.*
4. To prove, in support of such justification, the falsity of the plaintiff's statement, two witnesses, or one witness and strong corroborating circumstances, are necessary; but to prove the other allegations in the plea, one witness is sufficient....*Ibid.*
On the trial in such case, the jury were instructed that if the defendant had failed to prove the plea to be true, the filing of the plea was a great aggravation of the slander, and the jury should take that circumstance into consideration in assessing the damages. *Held*, (without determining what would be the effect of the plea were there no evidence introduced in its support,) that the instruction must, in this case, be erroneous, as it did not necessarily

- follow, as the instruction supposed, that the justification, if not fully proved, should aggravate the damages.....*Ibid.*
6. Where the plea of justification in such case is not entirely proved, but the evidence given under it shows that the defendant had reason to believe, from the plaintiff's conduct, that the charge was true, such evidence may be considered by the jury in mitigation of damages....*Ibid.*
 7. A declaration in slander alleged the words to have been spoken in a discourse with *A B*, in the presence and hearing of others. *Held*, that it was not necessary to prove that the words were addressed to *A B.*—*Richardson et ux. v. Hopkins*.....116
 8. The words "You hooked my geese," are not actionable in themselves.—*Hays et ux. v. Mitchell et ux.*.....117
 9. Words not actionable in themselves may express a criminal charge by reason of their allusion to some extrinsic fact, or of their being used and understood in a different sense from their natural meaning, and thus become actionable.....*Ibid.*
 10. An *innuendo* can not change the ordinary meaning of language....*Ibid.*
 11. In slander, the jury can not, in assessing the damages, take into consideration evidence of the defendant's having spoken, since the commencement of the suit, the same words as those laid in the declaration.—*Schoonover v. Rowe*.....202
 12. Words charging a woman who was never married with having had a child and buried it in the garden, amount to a charge of fornication, and are therefore actionable by statute.—*Worth v. Butler*.....251
 13. In an action of slander brought in this State for such words, it will be presumed, until the contrary be proved, that the words were spoken in this State.....*Ibid.*
 14. When the words charged are *prima facie* actionable, no averment of extrinsic facts is necessary.....*Ibid.*
 15. Slander for several sets of words (with a *colloquium*, &c.), some of which charged the plaintiff with having sued the defendant on a note he had never signed, &c., the others with having signed the defendant's name to said note without his permission, &c. *Held*, that the suit would lie for the latter words, but not for the former.—*Creelman v. Marks*..281

16. To said words charging the plaintiff with signing the defendant's name to the note without his permission, a plea that the plaintiff did sign the defendant's name to said note without his permission, was held to be good.....*Ibid.*
17. It is not sufficient in such action that the words proved have the same meaning with those laid. All the words laid need not be proved, but so many of them must be proved as will support the action.....*Ibid.*
18. The words "He" (meaning the plaintiff) "took a false oath," are not in themselves actionable.—*Roella v. Follow*.....377
19. In a suit for such words, there must not only be in the declaration the requisite inducement and colloquium, but there must also be an innuendo explaining the defendant's meaning by reference to the previous matter.....*Ibid.*
20. But if the words laid do, of themselves, import a crime, there is no occasion for an innuendo explaining their meaning.....*Ibid.*
21. If a justice of the peace issue a State warrant on an insufficient affidavit, and the party accused, on being arrested, proceed to trial before the justice without objection, the insufficiency of the affidavit will not render the proceedings *coram non iudice*. And to charge a witness with swearing false on such trial is actionable.—*Henry v. Hamilton*.....506
22. If a witness on his examination make a false statement, but afterwards correct it, so that his testimony is ultimately true, he is not guilty of perjury; and to charge him, without qualification, with swearing false in reference to that statement, is actionable.....*Ibid.*
3. Any property of the bank, whether it be land, or promissory notes, or specie, which it acquires and holds under the authority of the charter, is part of its capital stock.....*Ibid.*
4. The property of the bank subject to an *ad valorem* tax is such portion of the individual stock as has been paid in, and on account of which the stockholders are not indebted to the State*Ibid.*
5. The real estate of the bank, acquired and held under its charter, is exempt, as such estate, from taxation. *Ibid.*
6. A note and mortgage appearing on their face to be executed to the State Bank in its corporate name, will be presumed to have been taken in conformity with the charter of the bank, until the contrary be shown.—*Sparks et al. v. The State Bank*.....469
7. The bank, by the sixth section of the charter, may hold real estate which shall have been mortgaged to it by way of security for money due to it on a promissory note, executed on the same day with the mortgage. *Ibid.*

STATUTE OF FRAUDS.

See BOND, 14. FRAUDS, STATUTE OF. PLEADING, 12. VENDOR AND PURCHASER, 5, 35.

STATUTE OF LIMITATIONS.

See CHANCERY, 6, 7, 8, 10, 12. LIMITATIONS, STATUTE OF.

STATUTE, REPEAL OF.

See CRIMINAL LAW, 3.

STATUTES.

STATE BANK OF INDIANA.

1. The sum reserved for education by the charter of the State Bank on individual stock, and the *ad valorem* tax thereon, can not together exceed one *per cent.* on such portion of said stock as has been paid in, and on account of which the stockholders are not indebted to the State.—*The State v. The State Bank*.....393
2. The State Bank can be the owner of real estate only in a few cases, which are enumerated in its charter.—*The State Bank v. Brackenridge*.....395

1. If two statutes be inconsistent with each other, the last one must govern.—*Ham v. The State*.....314
2. The Legislature may declare statutes in force from and after their passage in cases of emergency; and of the existence of the emergency, the Legislature is the judge.—*Carpenter et al. v. Montgomery*.....415
3. *Habeas corpus*, on the petition of *Morris*, guardian, &c., directed to *Hovey* and wife, &c. Held, that the act of 1845, entitled "An act for the relief of *Abigail C. Hovey* and *Lorenzo D. Hovey*, of *Carroll county*," supposing it to be a public act, (it not having been pleaded), and to be constitutional, of which no opinion

was given, could not benefit the defendants in this proceeding; they not having shown that they had given the security required by that act.—*Hovey et ux. v. Morris*.....559

STEAM ENGINE.

See FIXTURES.

SUBSCRIBING WITNESS.

See EVIDENCE, 9.

SUBSTITUTION.

In general, a creditor having a right to resort to two safe and sufficient funds for satisfaction of his debt, may be compelled, in equity, by another creditor of the same debtor having a lien on one of those funds only, to look to that fund which the latter can not touch, or, if the former creditor have exhausted the fund bound for the debts of both creditors, leaving the other fund unexhausted, that fund may be reached by the unsatisfied creditor by the application of the principle of substitution.—*Hannegan v. Hannah et al*.....353

2. But there is no rule in equity by which a creditor can be compelled to accept a security for his debt, or by which another creditor can resort to it in his place, after he has rejected it*Ibid.*

SUNDAY.

See REPLEVIN, 7, 8.

SUPREME COURT.

See JURISDICTION, 1.

1. In a chancery suit before the Supreme Court, on a writ of error, the Court may render such a decree on the merits as the justice of the case requires.—*Shaeffer v. Sleade et al*...178

SURETY.

See PRINCIPAL AND SURETY.

SURPLUS REVENUE.

1. An agent of the surplus revenue is bound to pay the interest received by him as such agent to the school-commissioner, without demand.—*Mullikin et al. v. The State*.....77
2. The act of the 15th of February, 1841, by which the agents of the surplus revenue were continued in office, was a new appointment; and

for the subsequent defalcations of any such agent his sureties in a bond given previously to such appointment are not liable.....*Ibid.*

T

TAXES.

See STATE BANK OF INDIANA, 1, 4, 5.

TENANT.

See LANDLORD AND TENANT.

TRANSCRIPT.

The certificate of a justice of the peace to a transcript of his judgment in a cause, filed in the clerk's office, in the case of an appeal, was as follows: "State of *Indiana*, *Fountain* county, ss. I, *H. S. Scott*, a justice of the peace in and for said county, certify that the above is a full and true transcript of the above case, from my docket. Given under my hand and seal, this 15th day of *April*, 1842. *H. S. Scott*, J. P. (seal.)" Held, that the certificate was sufficient.—*Ward v. Hazlerigg*.....46

TREASURER.

See COSTS, 2.

1. A county treasurer holds his office for three years from the time of his election, and until his successor is elected and qualified.—*Ham v. The State*.....314
2. Under the statute of 1843, requiring the county treasurer to give bond on or before the 12th of *August*, &c., the county commissioners may approve of the bond before or at their first session thereafter.....*Ibid.*
3. If, after a county treasurer has given bond, with sureties, for the discharge of his duties, the law respecting county treasurers be changed, by extending the time for their making settlements and payments, &c., and the said treasurer fail to discharge his duties under the new law, he and his sureties will be liable on their bond.—*Kindle et al. v. The State*.586

TRESPASS.

1. To a declaration in trespass charging that the defendant assaulted, seized, violently pulled and dragged about, struck and imprisoned the plaintiff, a plea justifying the arrest and imprisonment by virtue of legal

- process, is bad.—*Kreger v. Osborn et al.*.....74
2. The plea in such case should show that the acts of violence were rendered necessary by the resistance of the plaintiff.....*Ibid.*
3. A *capias ad respondendum* issued by a justice of the peace, without an affidavit, against a person not a resident and householder of his county, operates as a summons, and does not justify an arrest and imprisonment. *Ibid.*
4. A party who causes a magistrate to issue, and the magistrate who issues, legal process, are not responsible for the unlawful manner of serving it, unless they participate in the unlawful act.....*Ibid.*
5. A declaration in trespass for cutting down and carrying away the plaintiff's trees is good, without an averment that the land where the trees were growing belonged to the plaintiff.—*Gronour v. Daniels*.....108
6. A license in such case can not be given in evidence under the general issue, but must be specially pleaded. *Ibid.*
7. An execution legal on its face, and showing jurisdiction in the Court that issued it, though it issued irregularly, (even without a judgment), is a justification to the officer acting under it, notwithstanding he had notice of the irregularity.—*Gott v. Mitchell*270
8. If a constable, having levied an execution on the debtor's goods, refuse to permit him (he having a family) to retain \$100 worth thereof as exempt from execution, but sell the same on the execution, he may be sued in trespass.—*Stephens et al. v. Lawson*.....275
9. If one of two judgment-debtors, who knows the judgment has been paid, procure a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods, he is liable in trespass to the party injured.—*Glover v. Horton*.....295
10. Trespass lies for a direct and violent injury to personal property, whether the act be done intentionally or through negligence.—*Schuer v. Veeder*.....342
11. Case also lies for such injury if it was occasioned by the defendant's carelessness, and the act was not willfully done.....*Ibid.*
12. In trespass *quare clausum fregit*, a license can not be given in evidence under the general issue. It should be specially pleaded.—*Crabs v. Fetick*.....373
13. If the declaration in trespass contain two counts alleging different assaults and batteries, and the defendant's plea justify only one of the trespasses, the plaintiff, by replying *de injuria*, waives the benefit of one of the counts, and can not give evidence of an assault and battery different from the one justified.—*Berry v. Borden*384
14. Trespass for an assault and battery—the declaration containing only one count. Pleas: 1, Not guilty. 2, *Son assault demesne*. The plaintiff new assigned. Plea, Not guilty, to the new assignment. Held, that the plaintiff was not obliged to prove two trespasses; but that it was sufficient for him to prove a trespass differing from that justified, and agreeing with that described in the new assignment.—*West v. Rosseau*.....450

TRIAL OF RIGHT OF PROPERTY.

See EVIDENCE, 3. RIGHT OF PROPERTY, TRIAL OF.

TROVER.

1. In trover commenced in the Circuit Court, when the demand does not exceed \$50.00, the plaintiff, though he recover, must pay the costs.—*Taylor v. Blount*.....38
2. To maintain trover, the plaintiff must show that, at the time of the conversion, he had a right of property and of possession in the goods.—*Redman et al. v. Gould*.....361

U

USURY.

See CHANCERY, 24, 25, 26, 27. PROMISSORY NOTES, 11.

1. An action for money had and received lies to recover the excess of interest paid on a usurious contract.—*The State Bank v. Ensminger*...105
2. In such suit against the State Bank, the plaintiff proved that the Bank had discounted several notes for him, and retained, under the name of exchange, a certain sum over and above legal interest; that the Bank had discounted other notes for the

plaintiff, during several years, after those charged with exchange were payable; and that the plaintiff's bank account was balanced. *Held*, that it might be inferred that the notes charged with exchange were paid. *Held*, also, that the retaining said sum over and above legal interest, as exchange, was usury.....*Ibid*.

3 The plaintiff in such suit offered in evidence a copy of so much of the discount book of the bank as showed the usury complained of: the original not being produced on notice. The clerk of the bank, who had made the copy on the plaintiff's application, testified that, having made it in a hurry, he could not be certain as to its accuracy. *Held*, that the copy was legal evidence. *Ibid*.

4 The pleas in such suit were the general issue and the statute of limitations. After the trial was commenced, the cause, by consent, was withdrawn from the jury and submitted to the Court; the parties agreeing that the only issue should be whether the defendant had received usurious interest from the plaintiff, and how much. *Held*, that, by the agreement, the defendant had waived the plea of the statute of limitations.....*Ibid*.

5. A bill in chancery for relief against a usurious contract must show that the principal and lawful interest have been paid or tendered; and in the case of a tender, the money must be brought into Court.—*Muir v. Clark*.....423

6. The 33d section of the R. S., 1843, p. 582, respecting "the interest of money," applies only to bills of discovery.....*Ibid*.

7. The act of 1843, respecting interest, which declares that usurious contracts shall not be void, &c., embraces contracts made before as well as those made after its passage, and is constitutional.—*Andrews v. Russell et al*.....474

Held, that if a promissory note for \$350 made by A to B without consideration, and indorsed by the latter, for the purpose of procuring money on it, was purchased of them by C, with notice of the facts, for \$300, the transaction was usurious.—*Hays v. Walker*.....540

9. *Held*, also, that C, in such case, though the purchase were made

before the act of 1843 respecting interest, might, since that act, recover from the indorser the \$300 paid for the note.....*Ibid*.

V

VARIANCE.

See ABATEMENT, 2. CHANCERY, 22. REPLEVIN, 9. SCIRE FACIAS, 8.

1. A bond sued on was described in the declaration as payable to "The President and Trustees of the town of Fort Wayne." The bond shown on *oyer* was payable to "The President and Trustees of the Fort Wayne corporation." *Held*, that the variance was fatal.—*The President, &c., of Fort Wayne v. Jackson et al*.....36

2. In a suit on a promissory note, the declaration professing to set out only the legal effect of the note, omitted the words "For value received," which the note contained. *Held*, that the variance was immaterial.—*Chapman v. Ellison*.....46

3. Debt on a promissory note. Plea, that the consideration of the note was the plaintiff's undertaking, by bond, to convey to the defendant a certain tract of land, but that the plaintiff never had any title to the land. The plaintiff having obtained *oyer* of the bond replied to the plea. *Held*, on demurrer to the replication, that the plea was bad, the bond shown on *oyer* being materially different from that which the plea had previously described.—*McDorman v. Jellison*.....304

4. Evidence that the defendant had beaten Catharine Swails will not support an indictment for an assault and battery on Ratharine Swails.—*Swails v. The State*.....324

5. An action of debt was brought against Owen Adanson and Joseph James, on a recognizance alleged to have been entered into by them before a judge for the appearance of said Adanson, at the next term of the Court, to answer a charge of forgery. Averment, that the defendants made default. Plea, *null tiel record*. An entry on the order book of the Court was offered in evidence to prove the defendants' default, the person accused being in such entry named Owen Adanson. *Held*, that the variance between the names Owen Adanson and Owen Adamson was immaterial, the prin-

ciple of *idem sonans* being applicable to the case.—*James v. The State*.

325

6. The record of a judgment, proved in this cause under a plea of former recovery, was objected to on account of the same variance mentioned above. *Held*, that the objection was not sustainable.....*Ibid*.
7. *Held*, also, that if in such case as the above, the causes of action were not the same, that fact should be replied to the plea of former recovery.....*Ibid*.
8. If a contract materially different from the one described in a count be given in evidence by the plaintiff without objection, its admission is not error; but such contract will not support the count.—*Jacobs v. Finkel*.....432
- An indictment for gaming alleged that the defendant, by playing at cards, &c., had won from *A. H.*, *A. C.*, and *G. H.*, a certain article, &c. The evidence was that the winning was by the defendant and another, as partners, from *A. C.* and *G. H.*, as partners. *Held*, that the variance was fatal.—*Wilcox v. The State*.
456
10. If in a suit on a bond, there be a variance between the date of the bond described in the declaration, and that of the bond produced on *oyer*, the variance is fatal.—*Compa-ret et al. v. The State*.....553

VENDITIONI EXPONAS.

- To a *venditioni exponas*, the constable returned "\$17.60 made by sale, and no more property on which to levy." *Held*, that the latter part of the return, viz., "and no more property on which to levy," was a nullity.—*Elliott v. Doughty*.....199

VENDOR AND PURCHASER.

See AGREEMENT, 1. CONVEYANCE. EXECUTORS AND ADMINISTRATORS, 4. FRAUDULENT CONVEYANCE. HUSBAND AND WIFE, 1, 5, 6. INFANTS. SALE OF GOODS. SHERIFF'S SALE.

1. A vendee of real estate filed a bill in chancery to restrain the vendor from the collection of the purchase-money, until the latter should pay off a mortgage on the land according to his agreement. *Held*, that it was not essential to the success of

the suit that the complainant should have tendered back to the defendant a deed for the land, nor that he should have offered to account for the rents and profits.—*Addleman v. Mormon*.....31

2. The purchaser of real estate incumbered by a mortgage can not, because of the mortgage, defend an action for the purchase-money, without having first extinguished the incumbrance to the amount of the debt sued for.—*Buell v. Tate*.....55
3. But if the incumbrance exceed the debt, the purchaser may, in a Court of chancery, have the collection of the debt enjoined, until the incumbrance be reduced to an amount not exceeding the debt.....*Ibid*.
4. *A* and *B* agreed under seal that *A* should sell and convey certain real estate to *B*, for which the vendor was to receive a certain sum, &c., when there should be made to the purchaser a good and sufficient deed for the property. *Held*, that this contract meant that *A* himself should execute the deed. *Held*, also, that *B*'s subsequent consent by parol to accept a deed for the property executed by a third person, and *A*'s tender of such deed to *B*, did not authorize *A*, in case of non-payment, to sue *B* on the original contract.—*Smith v. Addleman*.....119
5. A bill in chancery alleged the following facts: *A* purchased from a county agent a certain town lot, paid the purchase-money except a small sum, received a title-bond, and was put into possession. The obligee sold the lot to *B*, *B* sold to *C*, *C* sold to *D*, *D* sold to *E*, (who made valuable improvements), *E* sold to *F*, who sold to the complainant. The title-bond remained with the obligee unassigned during the sales to *B*, &c., and at each of them the purchase-money was paid, and the purchasers were respectively put into possession. The complainant, soon after his purchase, obtained from *F* an order on the obligee for an assignment of the bond, &c. The obligee acknowledged *F*'s right to control the assignment, but afterwards, at *F*'s request, assigned the bond to him. *Held*, that the case was not within the statute of frauds, and that the bill was sufficient. *Held*, also, that the Court was competent to decree that *F* should assign

- the bond to the complainant; that the obligee should pay the county agent the part of the purchase-money due him; and that, on such payment, the agent should convey the lot to the complainant.—*Underhill v. Williams et al.*.....125
6. Where a person enters into possession of real estate under a contract of sale, the vendor may, at any time previously to executing the conveyance, demand possession of the premises, and may also, if the demand be not complied with, recover the possession of them in an action of ejectment.—*Doe d. Brumfield v. Brown.* 142
7. The statute concerning tenants holding over, which requires three months' notice to quit, is not applicable to the above-named case, there being in that case no tenancy in which rent was reserved.....*Ibid.*
8. Debt on a sealed note for the payment of money. Plea, that the consideration of the note was certain land (describing it) belonging to one A, an infant; that at the time the note was given the land was sold at private sale to the defendant by one B, a commissioner appointed by the Probate Court for that purpose; that three notes were given by the defendant for the payment of the purchase-money, by installments, on one of which notes, being the one last due, this suit is founded; that at the time the notes were given, B, as commissioner as aforesaid, executed his bond obligating himself to convey all the right and title of said A in said land to the defendant, on payment of the purchase-money, provided the sale should be confirmed, but if set aside, the notes were to be returned to the defendant; that B has not made or tendered, nor offered to make or tender, to defendant, a conveyance for the land either absolutely or conditionally, or otherwise, but has hitherto failed to do so; that he can not make such conveyance, and the consideration of the note has therefore failed, &c. *Held*, that the plea was good.—*Henton et al. v. Beeler*.....150
9. A vendor's lien on real estate for unpaid purchase-money may be enforced against a purchaser from the vendee with notice.—*Pierce v. Gates.* 162
10. A note for the payment of money, and a mortgage on real estate to secure its payment, were assigned, and the assignee obtained judgment at law on the note against the maker. The mortgaged premises were afterwards sold on execution on the judgment to the judgment-creditor. *Held*, that the purchase was a discharge of the judgment to the value of the mortgaged premises.—*Johnston et al. v. Watson*..... 174
11. If real estate occupied by a tenant be sold, the vendee is entitled to the rents which accrue after the sale, unless they have been paid, before notice of the sale, to the vendor.—*Sampson v. Grimes*.....176
12. At law, an action may be maintained for false representations made by a vendor to a purchaser of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured.—*Shaeffer v. Sleade et al.* 178
13. If a purchaser of real estate from A pay the purchase-money, receive a title-bond conditioned for a conveyance at a future time, and be put into possession, and a subsequent purchaser from A, with notice, get possession afterwards, an assignee of the title-bond may, in equity, recover the possession from such subsequent purchaser.—*Hedges v. Bird et al.*.....215
14. The vendor's lien on real estate for unpaid purchase-money passes to his assignee of a note for the money, and may be enforced by a suit in equity, by such assignee, against a purchaser from the vendee, with notice.—*Brumfield et al. v. Palmer*.....227
15. And the circumstance that the original vendor in such case had not a good title when he was to have conveyed, (the contract being unrescinded, and a good title having been obtained and tendered by him before the suit was commenced); is not a sufficient defense.....*Ibid.*
16. A vendor of real estate having an equitable lien on it for part of the purchase-money, is not obliged (the vendee having absconded) to proceed against the land by attachment; but he may enforce his lien in equity.—*Russell v. Todd*.....239
17. A purchaser of real estate, *pendente lite*, will be bound by the decree.—*Green et al. v. White*.....242
18. A purchaser of an equity of redemption of real estate can not support an action of ejectment, com-

- menced before the revised statutes of 1843, for the mortgaged premises, against a purchaser of them from the mortgagee.—*Buller et al. v. Doe d. Rockafellar*.....247
19. The vendor of real estate took a promissory note for a part of the purchase-money, payable some months after date, considering the buyer able to pay. When the note fell due, the payee proposed to the maker that if the latter would pay him a part of the money, he would give a credit of several months longer for the balance. The payment of part was accordingly made, the old note taken up, and a new one given for the balance, payable at a future day. When the new note was given, the maker had sufficient property, besides said land, to pay the debt; and the complainant afterwards endeavored, without effect, to collect the debt by a suit at law. *Held*, that these circumstances did not affect the vendor's equitable lien on the land sold for the unpaid purchase-money.—*Aldridge v. Dunn et al.*.....249
20. A purchaser of real estate for valuable consideration and without notice, is not bound by an equitable lien on the land for unpaid purchase-money; but the law is otherwise as to judgment-creditors...*Ibid.*
21. A purchased at the land-office a tract of land, and took a duplicate receipt for the purchase-money, and then sold and assigned the certificate of purchase to *B*, retaining the duplicate receipt. Afterwards *A*, being in possession of the land, sold the same to *C*, and gave him a bond conditioned for a conveyance at a future time. *Held*, that *A*'s retaining the duplicate receipt did not affect *B*'s priority of claim to the land.—*Godfrey et al. v. Cushman et al.*.....253
22. If by a contract for the sale of real estate the purchase-money is to be paid before the execution of the deed, it is no defense to a suit on a note given for the purchase-money that the deed had not been made or tendered.—*Davis v. Heady*.....261
23. If to a suit on a note given in part payment for land, &c., the defendant plead that the vendor had no title, that he had not conveyed, &c., a replication that the consideration had not failed, as alleged, is good. *Ibid.*
24. Assumpsit. The first count was as follows: That on the 28th of *December*, 1840, the defendant sold to the plaintiff a lot of ground, numbered 12, in the town of *Richmond*; and, on the sale thereof, executed to the plaintiff a penal bond in the sum of \$1,000, with a condition, which, after reciting the said sale for the sum of \$500, payable as follows: \$100 in hand, a note for \$100 payable on the first of *October*, 1841, and a note for \$300, payable on the first of *October*, 1842, was for the executing, by the defendant to the plaintiff, of a good and sufficient warranty deed for the said lot on the payment of said notes; that, on the execution of said bond, the plaintiff paid the defendant the \$100 in cash, and executed the notes in the condition of the bond mentioned, and entered into possession of the lot; that, at the time of said sale, there was an unpaid mortgage on the lot previously executed by one *A*, the former owner of said lot, before the defendant had any title to it, to one *B*, for the sum of \$300, of which mortgage the plaintiff was ignorant until long after his purchase; that, afterwards, in 1842, the lot was sold under a decree on the mortgage, and the purchaser under the decree turned the plaintiff out of possession; that the defendant, therefore, was unable to make the plaintiff a title to the lot; and that the plaintiff, before notice of the mortgage, had made valuable improvements, &c.; yet the defendant, though often requested, had refused to pay the \$100 paid on the lot, or to pay for the improvements. *Held*, that this count was bad; it containing no promise on which the action could be supported.—*Ferguson v. Rhoades*.....262
25. The second count was for money had and received, &c. One ground relied on to support this count was, that the defendant had no title to the lot sold to the plaintiff, as stated in the first count; and to show such want of title, the mortgage, decree, and sale under the decree, mentioned in the first count, were proved. *Held*, that the mortgagor's title not being proved, the evidence was insufficient.....*Ibid.*
26. Assumpsit by the assignee of the payee of a promissory note against the maker. The note was dated the

- 1st of *December*, 1836, and payable ninety days after date. Plea, that the note was executed in part consideration of certain town lots; that on the execution of the note, the payee gave his title-bond to the defendant, the condition of which (after reciting that he had received one-third of the purchase-money, and the defendant's note for the residue, payable in three years) was for a conveyance of the lots to the defendant, on payment of the residue of the purchase-money; that four years elapsed after said notes and bond were given before this suit was commenced; that the note sued on was given for the one-third of the purchase-money alleged in the bond to have been paid; and that the payee did not, on the 1st of *December*, 1839, or at any time previously, execute or offer to execute to the defendant a deed for the lots; wherefore the consideration of the note had failed. *Held*, that the plea was bad. —*Cox et al. v. Hazard*.....408
27. Same point.—*Cox et al. v. Wells*.410
28. To debt on bond conditioned for the conveyance of real estate within a certain time, the defendant may plead that the deed had not been demanded before the commencement of the suit.—*Brown et al. v. Hart*429
29. But it is not necessary that the holder of such bond should prepare the deed and present it to the obligor to be executed.....*Ibid*.
30. If by an agreement for the sale of real estate, the making of the title and the payment of the purchase-money are to be concurrent acts, neither party can sustain a suit on the agreement without having first performed or offered to perform his part of it.—*Shirley v. Shirley et al*.452
31. Nor can a party to such contract rescind it without the other's consent, unless there has been an offer of performance on his part, and a refusal to perform by the other.*Ibid*.
32. A vendee of real estate has a lien thereon for the money paid, if the vendor refuse to convey; and the lien continues against a subsequent purchaser with notice*Ibid*.
33. Chancery. A judgment at law for a part of the purchase-money of real estate was enjoined on the ground that the vendee had been deceived by the vendor as to the title, and had remained ignorant of the defect therein until after the rendition of the judgment.—*Fitch v. Polke*.....564
34. The answer to said suit alleged that the complainant knew the facts in the case pending the suit at law, and pleaded the same in bar. *Held*, that the *onus probandi* was on the defendant.....*Ibid*.
35. At a public sale of town lots, a lot was struck off to a person for a certain sum, and a memorandum of the purchase was made at the time by the clerk of the sale in the sale-book. *Held*, that the sale was valid under the statute of frauds.—*Hart et al. v. Woods*.....568
36. The vendor of the lot so sold afterwards tendered a good conveyance in fee for the lot to the vendee, if he would pay the purchase-money, or allow the same on a note held by him on the vendor. The tender was refused. *Held*, in a suit on the note by the assignee of the vendee, (the assignment having been made after the tender), that said purchase-money was a legal matter of set-off. *Ibid*.

VENUE.

See CRIMINAL LAW, 5, 6, 7. INDICTMENT, 24.

An objection to a declaration in trover because the venue is wrong can be made only on special demurrer.—*Dumont v. Lockwood*.....576

VERDICT.

1. A verdict against the defendant in manslaughter must fix the punishment.—*Dias v. The State*.....20
2. A verdict finding the defendant guilty on one of several counts of an indictment, and saying nothing of the other counts, is, as to such other counts, equivalent to an express finding of not guilty. A judgment may be rendered on such verdict; and the proceedings will be a bar to a future prosecution for any of the offenses charged in the indictment.—*Weinzorpfm v. The State*.....186
3. The entry, after such judgment, of a *nolle prosequi* of the counts concerning which the verdict is silent, is a nullity.....*Ibid*.

VOLUNTARY CONVEYANCE.

See CONVEYANCE, 6, 7, 8, 9, 10, 11.

W

WARRANTY.

See PLEADING, 13. SALE OF GOODS,
1, 3.

WIDOW.

A widow has no claim on her deceased husband's estate, relative to the \$100 worth of personal property allowed her by the act of 1838, if she fail to select the property before the sale of it by the executor.—*Johnson v. Robertson et al*425

WILL.

See DEVISE.

WITNESS.

See BANKRUPT, 2. EVIDENCE, 1, 2,
9, 15. PRACTICE, 12. RIGHT OF
PROPERTY, TRIAL OF, 2.

1. In debt against a constable for an escape on execution, the execution-debtor is a competent witness for the constable.—*Bond v. Brady*.....39
2. In debt against a constable on his official bond for a false return of a *feri facias*, the execution-defendant can not be objected to as a witness for the plaintiff on the ground of his being interested.—*Limpus v. The State*43
3. A executed a bond for the delivery of goods taken on an execution against B, which goods were afterwards, on A's claim, adjudged to be his, and were therefore not delivered according to the condition of the bond. Held, that in a suit by C against the officer for a false return of the execution, A's execution of the delivery-bond (he having been discharged from it by said adjudication) did not render him incompetent as a witness for either party.*Ibid.*
4. A witness can not be impeached on the ground that he had made previous statements inconsistent with his testimony, until he has been asked whether he had made such statements.—*Weinzorpslin v. The State*.....186
5. A person for whose use a suit is brought being liable, by statute, for costs if the suit fail, is not a competent witness for the plaintiff.—*Ellison et al. v. Johnson*.....217

6. Nor can he be rendered competent in such case by his release of his interest in the cause of action to the plaintiff.....*Ibid.*
7. A witness is not liable to a suit for evidence given by him in a cause.—*Grove v. Brandenburg*.....234
8. A bankrupt is not a competent witness, in trover by his assignee, to prove property in the latter, unless he release to the plaintiff all claim to an allowance out of his estate, as well as to the surplus.—*Cully v. Ross*312
9. If the subscribing witness to a bond reside out of the State, the plaintiff may prove his handwriting, although the defendant have procured his deposition, and filed it in the cause. But if after a refusal in such case to receive evidence of the handwriting of the witness, the plaintiff resort to the deposition to prove the execution of the bond, such refusal can not be assigned as error.—*The State v. Bodly et al.*.....355
10. The defendant can not introduce a witness to prove facts which, if true, would show that the witness, and not the plaintiff, was entitled to the subject-matter of the suit.—*Jacobs v. Finkel*432
11. The circumstance that a person has executed an appeal-bond in the name of the plaintiff, and as his attorney in fact, in the case of an appeal from a justice's judgment, does not render him incompetent as a witness for the plaintiff on the trial of the cause in the Circuit Court.—*Bradbury v. Dougherty*.....467
12. Evidence of the declarations of a witness, made out of Court, that he is interested in the suit is inadmissible to prove him incompetent.—*Griggs v. Voorhies et al.*.....561
13. To permit a party to ask a witness, whom he had previously called and examined, and whose testimony was unimpeached, whether he had any interest in the suit, is irregular, but can not be assigned for error....*Ibid.*

WRIT OF INQUIRY.

See BILLS OF EXCHANGE, 8. INQUIRY,
WRIT OF.

WRONG NAME.

See PLEADING, 4.

